

SUMMARIES AND RESPONSES TO ORAL AND WRITTEN COMMENTS

PUBLIC COMMENT RECEIVED IN RESPONSE TO THE DEPARTMENT'S INITIAL NOTICE OF CHANGE TO DIRECTOR'S RULES (CLOSING MARCH 22, 2011) HAS BEEN SUMMARIZED BELOW (WITH INITIALS IDENTIFYING THE COMMENTS OF SPECIFIC INDIVIDUALS), TOGETHER WITH THE DEPARTMENT'S RESPONSES AND ANY ACCOMMODATIONS TO RECOMMENDATIONS FOR AND/OR OBJECTIONS TO CHANGING THE REGULATION AS ORIGINALLY PROPOSED:

The following specific comment has been accommodated:

Property

Please change 15 CCR 3084.7(e)(3) to delete reference to the Third Level. [J-#1]

RESPONSE: This provision had already been eliminated, see new 3084.9(f) as contained in Notice of Change to Regulations (NCR) #11-02.

THE FOLLOWING NON-SUBSTANTIVE COMMENTS WILL BE ACCOMMODATED:

Editing Errors

Adjust the text of the CDCR Form 602 instructions as follows:

- "California Code of Regulations" and (CCR) are misplaced. [ECRK-#23]
- Replace "lead" with "led" [ECRK-#24]
- Subsection (f) refers to a "Section H" of the 602 form, although no section of the form is so designated. [LB-#8]

The Form 22 appears to contain a typographical error below "Section C."

- The inmate is instructed to "keep final goldenrod copy."
- The final copy is Canary, not Goldenrod. [SH-#9]

3084.2(h)(6) should read: "...group appeal counts towards..." [ECRK-#36]

RESPONSE: These minor typographical and formatting suggestions are accepted as non-substantive accommodations. There is no absence of a "Section H" portion of the 602, merely an omission of designation "H" on the form. This will be rectified. While the noted Form 22 error was a production mistake, the version depicted in NCR #11-02 is correct. When the initial printing run is exhausted, the correct text will appear in the proper place on the form in question.

SELF-IDENTIFIED REVISION(S) IN THE TEXT

A recapitulation of any change in the text contained in the NCR initially, including changes not otherwise identified and discussed above is presented below:

Changes Throughout

Any additional non-substantive changes may have been made throughout the text where necessary, including: inappropriate upper-case letters changed to lower-case; supercilious words deleted without changing text meaning; enumeration changed as needed to maintain the appropriate sequencing of text; improper capitalization of job titles dropped; grammatical errors corrected; or words added in order to clarify the intended meaning of the original text.

3086(h)

As originally published, 3086(h) specified supervisory action within seven calendar days. Upon further review and feedback internal to the organization and from staff in particular, the text has been changed to seven working days. The reason for this adjustment, which is deemed nonsubstantive in intent, is to establish consistency with the requirement of the previous subsection, whereby employee action is to be accomplished within working, as opposed to calendar days. Such added conformity will improve the likelihood for compliance and avoids placement of differing yardsticks next to each other for the measuring of elapsed time. While this

SUMMARIES AND RESPONSES TO ORAL AND WRITTEN COMMENTS

change does extend somewhat the timeframe for response to the benefit of staff, there were no comments received on the matter one way or another.

THE FOLLOWING GENERAL EXPLANATION IS OFFERED PREPARATORY TO SPECIFIC RESPONSES:

RESPONSE: To preface responses specific to the comments received, the following information provides an additional explanatory update to the ISOR and a general introductory basis for the responses presented in this document.

THE APPEAL PROCESS HAS NOT BEEN (NOR SHOULD IT BE) DRAMATICALLY ALTERED

Fundamentally, the existing appeal process has not been dramatically altered, nor have existing safeguards or protections afforded appellants been overturned. Readers simply accepting at face value the often dramatized claims of commenters could, regrettably, reach the opposite conclusion.

- NCR #11-02 announces what can only be fairly characterized as gradual, incremental revisions to existing forms, practices and text—as constrained by prevailing circumstances, fiscal and otherwise—and all properly justified in the required detail in the ISOR.
- As ISOR page 2 stresses, organizational resources are diminishing, not growing. Accordingly, the only readily available option (if anything meaningful is to be accomplished at all) is for the continuity of past practice to serve as guide to decisions about the present.
- Obviously, relatively modest (albeit notable) adjustments that make the system more accountable and accessible are possible, and have been made. However, dramatic and implicitly expensive departures are not feasible because significant additional benefits beyond the changes already made would be unlikely and serious contemplation of major course modifications now and into the foreseeable future has been foreclosed by external constraints. Doing so would risk disruption greater than can be tolerated or could in the end be potentially counter productive.

In support of this contention, there follows a summary and discussion of the key changes, with special attention to how existing practice has been altered, and why. Replies to commenter suggestions for alternatives on a topic and/or section specific basis will constitute the much of the content of the remainder of this document, commencing on page 7.

- The right to file grievances to redress a perceived harm continues as before, and to do so, appellants must use a form in which they state the problem and desired remedy. While the principal appeal form format has been revised, new ancillary forms introduced and clarity added with respect to establishing what documents are appropriate in support of the grievance, fundamentals have not been altered. Reasons for changes are set forth notably on ISOR pages 3 and 5, the desired goal being cutting down on illegible, voluminous and massive submissions obscuring issues and contributing to the cost and burden of processing. While not all appellants submitted such grievances, those doing so typically attached more than the previously allotted one sheet continuation page and were much more likely to contain rambling discourses rather than descriptive material or essential facts. Additionally, many other documents of dubious relevance would accompany the grievance, such as copies of court cases, previous appeals and affidavits by other inmates attesting to the appellant's arguments, thanks to preexisting rule ambiguity regarding this matter. Similarly, absent any written instruction to the contrary, appeals could (and frequently were) submitted in minuscule handwriting or print, obscure script or in pencil too faint to read. Beyond being an additional deciphering chore, determination of the grievance subject became a major difficulty and in extreme cases, an impossibility. When an appeal became the basis for litigation, new issues could be implied or past responses made to appear inappropriate or inadequate due to confusion about the nature of the original issues raised in the appeal. Pencil originals could (and were known to be) altered to the advantage of the appellant, subsequent to initial submission or between levels of review. Also thanks to past rule ambiguity, universal or omnibus grievances could be submitted, the formulation of

SUMMARIES AND RESPONSES TO ORAL AND WRITTEN COMMENTS

straightforward responses to which were impossible. These problems (among others as the ISOR details) have required the adoption of much more rule specificity about submissions.

- As before, the appeal is subject to review and possible initial rejection. Also, as before, if rejected appeals are unacceptable the appellant is provided clear instructions on what to do so that the appeal may qualify for processing. The additions to detail respecting such matters have been explained on ISOR pages 10 through 11, principally. The necessity for such greater detail directly relates to previous rule ambiguity, under which a host of appeal problems emerged in addition to those mentioned already. These included (but were not limited to) incomplete submissions, complaints about non material issues for which the appeals process can provide no possible remedy or meaningful relief, threatening or otherwise content inappropriate submissions, submissions intentionally skipping required levels and documents contaminated with organic matter. Once these obstacles have been overcome, corrected and/or remedied (as appropriate), the appeal can advance to the next phase wherein the claims and allegations contained therein are evaluated and addressed. It should be emphasized that commenter's fears that the word "material" is intended to exclude certain issues is highly misplaced. As used and trained around this word signifies that speculative and unsubstantiated claims with no demonstrable harm are actually to be returned with direction that the appellant provide additional information. Absent such information the appeal response is a pro forma exercise without focus or purpose.
- Appellants continue to enjoy the due process of graduated level review, up to the Secretary's level of consideration, whereby appeal decisions are subject to reevaluation (upon request) leading to the possible amendment or overturning of lower level outcomes. The First Level of Response is the facility's answer to the appeal, the Second Level of Review represents the Institution's answer to the appeal, and the Third Level of Review is the final response rendered on behalf of the Department. What had been intended to be an initial, informal review level has been discontinued. While the hope was that complaints would be resolved informally and the necessity of further review thereby avoided, such expectations were not being realized. Reasons set forth on ISOR pages 2, 3, 16 and 17 explain why the informal step did not work in the manner intended, as well as how a new written request process has both a compensatory and separate purpose beyond that of replacing the "informal" appeal step.
- Finally, as opposed to diminution, there has been a significant expansion of the preexisting scope of appeal rights enjoyed by inmates and parolees. The staff complaint process has been enshrined in regulation for the first time and the scope of emergency appeals has been clarified to remedy a preexisting rule deficiency in identifying issues that, due to their urgency, rise above normal submission limits and time constraints. Additionally for the first time Appeals Coordinators (AC) have been given discretion to waive any restriction they determine would deny an appellant access to remedy on a matter of significant consequence (see also exceptional circumstance discussion, beginning page 5).

CASE LAW HAS LIMITED (IF ANY) APPLICABILITY IN MANY INSTANCES

Applicable and relevant only to the specifics of the case argued, while case law can be the final interpretation of what is "legal," the scope of that decision is narrowed significantly by the jurisdiction of the court in question, the facts at issue, and a number of other factors including timeliness and circumstance. Great care was taken to ensure that existing language was not contrary to any known and relevant court decision and to this end the regulations were subjected to several different and separate legal reviews. Consequently, commenter assertion(s) of the applicability of any particular case, particularly in an effort by those outside the legal system to substantiate rule "impropriety" carries little weight, independent of an adjudicated outcome in which facts are argued and comparatively evaluated against other documented outcomes. While infringement of "constitutional rights upheld by case law" are cited by offenders as a frequent basis for Departmental appeals, the validity of such assertions are so dependant on case particularities as to render such allegations nearly meaningless when made in blanket or general terms, as has been done by many commenters here. Also, unless adjudicated outcomes are published and jurisdictionally appropriate, a decision reached by a particular court may not be enforceable elsewhere beyond the geographic locality of the court in question. Consequently,

SUMMARIES AND RESPONSES TO ORAL AND WRITTEN COMMENTS

and especially since the rulemaking adoption process is not a judicial-like setting for dispute resolution, there will be no attempt to argue or debate the relevance of case law with respect to any particular provision of rule posed in the NCR #11-02 package. Equally important is the fact that none of the changes set forth in NCR #11-02 are necessitated by case law.

PENOLOGICAL INTEREST PREVAILS WHEN DETERMINING WHAT CONSTITUTIONAL RIGHTS ARE AFFORDED INCARCERATED INDIVIDUALS

Many individual commenters have cited constitutional case law in making the assertion that fundamental rights have been abridged by the promulgated appeal changes. In fact, such claims ignore the realities of prevailing constitutional case law, particularly as upheld by the US Supreme Court.

In a series of cases (and depending upon the nature of the right being specifically asserted), the court has marked out three distinct approaches or tests to the question of prisoners' rights. Moreover, regardless of the test, caution and considerable deference to prison administration has been a consistent hallmark of the court's approach.

(1) In *Turner*, the court has held that application of the "highest protection from infringement" standard of the First Amendment would seriously hamper the ability of prison officials to anticipate security problems and to adopt solutions to "intractable" problems of prison administration. Additionally, the Court chose a variation of a "reasonable relationship" test, the lowest level of constitutional justification, normally reserved for the analysis of governmental regulations that intrude on economic, as opposed to political rights enjoyed by the at large population. Using this standard the Court held that a prison rule is valid if it is reasonably related to a legitimate **penological interest**. (2) In the Court's treatment of cases which claim that the conditions of confinement violate the "cruel and unusual punishment" Eighth Amendment provision, the test is that conditions will not be held unconstitutional unless there also is a finding that the prison officials' subjective intent was to impose upon an inmate cruel and unusual punishment. (3) Under the Court's procedural due process model for resolving issues relating to prison disciplinary decisions, a prisoner is not entitled to a due process hearing—even if a sanction is imposed on the prisoner as punishment—unless the sanction imposes an "atypical and significant hardship" beyond that which is generally inherent in the "ordinary incidents of prison life." This test was adopted in accordance with the observation that, being more dangerous and more in need of the application of administrative discretion, prison settings are different from larger society.

What all three cited tests have in common is a very different scale for measuring whether an inmate's rights have been violated than the scale used for determining the constitutional rights of persons who are not in prison. They all afford prison officials broad discretion to curtail and limit rights of incarcerated individuals, as long as at least minimal justification for doing so exists.

ONLY MORE EFFECTIVE OR AS EFFECTIVE AND LESS BURDENSOME ALTERNATIVES NEED BE CONSIDERED

Based on comment content, tone and intimation it is apparently a widely held assumption (if not outright conventional wisdom) that the Department is obligated to accommodate any objection, suggestion and/or demand posed during the public comment phase, particularly if objections can be made in voluminous detail, no matter how trivial or farfetched. Similarly, any commenter "finding" of rule duplication, inconsistency, absence of clarity and/or necessity is justification enough for invalidation (in part, if not wholly). To this end in fact in several instances there is an attempt to evoke outside "intervention" to overrule the present rulemaking effort.

While the purpose of California's Administrative Procedure Act (APA) includes improving the quality of adopted regulations, it is actually the intent of the Legislature that neither the Office of Administrative Law (OAL)—the entity whose intervention is requested—or courts should substitute their judgment for that of the rulemaking agency as expressed in the substantive content of the regulations in question. In addition, there is no expectation that an agency must change adopted, amended or repealed rules unless the posited alternative is as effective or as effective and less burdensome (particularly to the private economic or business sector—As noted above, penological interest is controlling with respect to incarcerated individuals). Objections or recommendations posed in response to the solicitation of public comment must be summarized

SUMMARIES AND RESPONSES TO ORAL AND WRITTEN COMMENTS

and if accepted, explained. Likewise, if declined, the reasons why no change was made must be provided. Commenter assumptions to the contrary, therefore, the Department is obligated **only** to consider those recommendations as effective or less burdensome to the substantive content of the rule in question. In addition, again aside from commenter objections or recommendations, the Department is obligated **only** to provide an explanation why changes are not made, if declined. Contrary to these specifics, therefore, commenter belief that any recommendation must be accepted and any objection must on its face be sufficient for the rejection of the rule change is incorrect. The other common notion that any objection to regulatory burden should be remedied in the manner suggested by the commenter, typically ignores the fact that the suggestion must also be **as effective** and less burdensome.

Furthermore, determination of whether an agency has satisfied certain adoption standards (including necessity, clarity, consistency and non-duplication, among others) is not made on the basis of commenter opinion or observation, but rather by OAL review. Such review (with respect to clarity in particular) may take into consideration the context of related regulations already in existence (such as those being superseded in the present case) and there also is to be no substitution of OAL's judgment for that of the rulemaking agency as expressed in the substantive content of adopted regulations. Moreover, the standards cited are not intended to be revealed errors, but rather are inclusive of a number of other processing criteria which must be met in order to prevent the return of a rulemaking file to the originating agency. Even in the event of deficiencies at this processing stage, agencies have the option of correcting such matters and proceeding with the rulemaking process (see also discussion beginning on page 14 below).

Nevertheless, this document will provide responses (where feasible) addressing statements, claims and assertions for which in most circumstances no response is required or border on the outrageous and absurd, particularly if measured in the context of regulatory adoptions initiated by agencies other than this Department. This is undertaken purely in the interest of better educating those who might be moved to comment in the future about what can be achieved by doing so, although the Department certainly has no reason to expect that existing prejudices will be thereby dispelled.

EXCEPTIONAL CIRCUMSTANCE CLAUSE HAS UNDERAPPRECIATED IMPORTANCE

ISOR page 10 emphasizes the newly adopted provision of Subsection 3084.6(a)(4). This rule affords otherwise absent leeway on the part of appeals officials to waive any restriction which could otherwise deny review of an issue that would result in substantial irreparable harm or loss to the appellant. Unfortunately, the significance of this provision has almost wholly escaped the attention of commenters. Emphasis instead has been nearly universally upon alleged AC misconduct, AC bias against appellants and other such supposed shortcomings, including a lack of faith in the integrity of all appeal officials. Nevertheless, the exceptional circumstance clause upholds the interest of appellants in numerous and important ways:

- Appeal Coordinators, the Third Level Chief and staff will have the latitude to accept any appeal on a case-by-case basis when circumstances support granting such an exception to normal processing.
- Implicitly, appellants will be afforded the ability to exceed the one appeal every 14-calendar day ceiling and/or permitted additional time to comply with the timeliness for appeals requirement, if such a restriction could otherwise deny review of an issue that would result in substantial irreparable harm or loss to the appellant (The threshold of substantial and irreparable is crossed when extraordinary and serious harm or loss would be incurred by the appellant).
- Likewise, if circumstances so dictate and when compelling evidence supports granting such an exception, this clause conceivably permits any requirement with regard to form use, number of attachments, type of attachment, or similar such expectation to be waived, on a case-by-case basis. For example, failure to conform to or to comply with any submission requirement (such as mandatory use of black or blue ink) shall be excused if the appellant is unable to comply due to reasons beyond their control at the time the appeal is written. Compelling evidence includes, but is not limited to, receipt of new information such as documentation from health care staff that the inmate or parolee was medically incapacitated and unable to file, or confirmation that ink-producing writing instruments weren't available.

SUMMARIES AND RESPONSES TO ORAL AND WRITTEN COMMENTS

Similarly the requirement of one 602-A continuation attachment only will be waived upon presentation of compelling evidence of a need for additional space either to provide important facts or to better expound upon existing facts. That waiver can be granted at any level of review so that the Third Level of Review will be able to correct any situation which they construe as denying an inmate access to remedy as long as it is brought to their attention.

- The intention is for no inmate/parolee ever to be inadvertently precluded from legitimate access to the administrative remedies afforded, especially due to a temporary physical injury, mental illness, sickness or medical emergency or **any** other exigency beyond their control.

The exceptional circumstance clause functions in **addition** to the emergency appeal provision and, absent any restriction on the number of medical appeals and/or requests for reasonable accommodation that may be imposed by others, conceivably permits the submission of multiple appeals by the same individual on a daily basis, irrespective of any other requirement or rule.

OPERATIONAL GUIDANCE AND TRAINING SUBSEQUENT TO RULE ADOPTION

The Appeals article establishes the regulatory context for the appeals process administered by the Department. Operational practices, training delivery, procedural guidelines and administrative interpretations based upon these rules must originate and be disseminated throughout the Department on a state-wide, regional and institution, facility or office-specific basis, as needed for effective implementation. The principal means for establishing state-wide operational guidance is the Department's Adult Institutions, Programs and Parole Operations Manual (aka "DOM"). In point of fact the DOM as a Departmental standardizing publication is precedent to most of the Department's rules adopted pursuant the APA. However, contemporary practice dictates corresponding adjustments in the DOM subsequent to promulgation of offender-affecting rules. Accordingly, pending is adoption of a comprehensive revision of Chapter 5, Article 53: Inmate/Parolee Appeals as well as adoption (and the relocation of existing content) of Article 54: Written Request Process. In addition, the Inmate Appeals Branch provides Appeal Coordinators written operational guidance consistent with the new rules and draft DOM content. Among the operational details, specifics and elaborations particularly germane to comment received in response to NCR 11-02, the following are notable:

- Further elaboration as to the purpose of the appeals article with respect to administrative goals is provided;
- Expectations with respect to delegated staff under appeals coordinator (AC) direction are delineated;
- Latitude granted the appeals coordinator with respect to the acceptance of appeals in pencil and for otherwise similarly nonconforming submissions are discussed.
- Latitude is granted the coordinator with respect to permitting 602-A submissions in addition to those permitted by regulation;
- Clarification of proper logging practices and on the uniform interpretation of appeal "submittal" is provided;
- There is clarification about when it is acceptable to permit previously processed appeals as a supporting document;
- Identification, by number and name, of supporting documents specific to matters appealed is included;
- Further elaboration of the best practices to follow when designating "not processed" submissions occurs;
- Additional elaboration is provided on screening practices, including use of the Appeals Tracking System;
- Guidance on processing withdrawal requests is added;
- Cautionary admonition has been made to avoid screening out on the basis of instances where the appellant has obvious difficulty with written expression or uses a word or two of profanity when quoting others or for emphasis;
- Additional operational specifics applicable in cancellation cases is afforded;
- Written response preparation details are set forth;
- Guidance exists on establishing "day one" for logging and processing purposes;
- Explanation of how the confidential correspondence process can be used to ensure staff complaint confidentiality is provided;

SUMMARIES AND RESPONSES TO ORAL AND WRITTEN COMMENTS

- Processing specifics relative to the Rights and Responsibility statement, including a reminder that cancellation of appeals for lack of cooperation does not relieve the Department of its responsibility to address alleged staff misconduct, are included.
- Further elaboration of employee expectations with respect to processing and responding to requests posed via the CDCR Form 22 is set forth.

Public input about such internal management matters is not contemplated by the APA nor should the voluntary disclosure above be interpreted as a solicitation of such, now or ever. However, it does serve to better inform about how rule implementation will proceed and how some of the anxieties commenters have expressed have been operationally anticipated. Clearly some of the expectations expressed are not as dire as supposed, in light of the Department's capability for additional operational guidance. In fact many of the issues raised have already been carefully considered and training material developed to address the possibilities raised. Also, irrespective the negativity, misconceived basis and/or sarcastic intent of any comment received about the rules in question, many have served the Department with respect to identifying where additional staff instruction or operational guidance may be desirable or possibly even a necessity, and worthy for inclusion in operational and training documents.

The following specific comments are not accommodated for the reasons given:

Legislative "Mockery"

The proposed action is a mockery of the California Legislative process. Since when can a Department in the state change the laws put in place by the duly elected Legislature to suit their own purpose? If this is allowed, then ANY department could change the law to suit their own needs and not the needs of the people that the laws were put into place to protect. [MH2-#1]

RESPONSE: The Department's NCR #11-02 is not a legislative enactment and does not, contrary to the commenter's opinion, change statutory law. The Department, by statutory authority granted to it by the Legislature (Penal Code [PC] Section 5058) does have the authority to make regulations [rules] applicable to offenders under its custody and for the institutions and facilities under its control and administration. Granted to the Department by the Legislature is the ability to adopt emergency regulations (PC 5058.3). If a regulation is adopted by the Department under this authority, the Secretary certifies in a written statement filed with the Office of Administrative Law (OAL) that operational needs require such action [see, discussion beginning page 12]. Furthermore, before promulgation, OAL announces the proposed emergency regulatory adoption and invites public comment, within a specified time frame. Additionally, OAL reviews the proposed regulations to ensure that all APA standards and requirements have been satisfied prior to promulgation. All these requirements were satisfied before the announced adoption date of January 28, 2011. Delegation of regulatory authority to other agencies of state government is commonplace. In addition most, if not all, other regulation-adopting agencies also have the authority to establish or amend regulations on an emergency basis.

Intended Purpose Unclear and/or Misleading

While the intended purpose of the change is not clear, the effect of the change is very clear. Any change such as that which is proposed in NCR 11-02 should have its reasoning and motives clearly laid out for the people's examination. [DM-#1]

The proposed changes have the cumulative effect of denying constitutional and statutory redress. While the aspirations put forward...in the ISOR...are laudable, its chosen methodology represses redress and renders the grievance system silent in several areas of staff misconduct. It also puts forth "paper provisions," [a] term [for] ...the proposed provisions which theoretically address deficiencies [...]. In actuality the logistical realities of prison operations render these provisions non-functional. The central parties of interest (inmates and staff) instantly recognize that these protections will not occur, it is the public and OAL reviewers who are being misled into reviewing these regulations as bringing constitutional consistency to this system of proposed redress. [SD & KB-#1]

SUMMARIES AND RESPONSES TO ORAL AND WRITTEN COMMENTS

RESPONSE: A seventeen page Initial Statement of Reasons (ISOR) accompanied the NCR in satisfaction of the statutory requirement whereby the specific purpose of and necessity for change was addressed in both general and specific terms. Relative to each and every section affected, specific explanations have been provided (ISOR pages 4-17). Certainly, readers may disagree or take issue with ISOR content; however, to assert that intended purposes are not clear ignores ample evidence to the contrary. On the opposite end of the spectrum is the commenter claim that while ISOR aspirations are laudable, the public and OAL reviewers are being deliberately misled. Prison logistics may indeed hinder or make difficult achievement of stated methodologies, as has been asserted by a commenter. The suggestion that the Department deliberately intends for these rules to be non-functional and that inmates and staff "instantly" recognize them as "paper provisions" is wholly opinion-based and, of course, is an assertion no public agency can reasonably be expected to have to defend against. Furthermore, the "paper provision" thesis negates rulemaking of any type, as the underlying premise presupposes that deliberate deception motivates public officials engaged in such undertakings, irrespective of agency. These changes were carefully crafted to make the process more transparent and accountable as can be demonstrated by the safeguards now built into the process that were previously absent. The argument that these safeguards are merely a deception is directly contradicted by the fact that these safeguards are, for the first time, enforceable.

Make No Changes

I hereby oppose the changes. The new policy violates inmates' rights in all aspects. The old policy is adequate enough and despite the fact appeal coordinators abuse their discretion and neglect to process appeals with an abusive screen-out process, the informal level already serves the purpose the recommendation changes suggest. At present **[commenter means "previously," inasmuch as existing rules were superseded 1/28/2011]** when an inmate exercises the right to appeal, the appeals coordinator automatically reject the appeal, then informs the appellant that he/she must first file a request for interview, whereas an interview request is not a right to appeal as provided by due process. Then when the inmate reaches the stage for the appeal process, it is further rejected based on a number of factors including a material standard versus adverse affect standard. So, in other words it's up to the appeals coordinator whether or not an inmate can appeal an issue whereas as its no longer based on the inmate's right to appeal. As a result, I'm submitting a 602 **[summary below]** on the issue to take the matter to court, in the event the changes are fully adopted. So now, therefore, under the new policy I have to request an interview before I can appeal this matter. As of this date the changes are a proposal, right? Therefore, I timely filed the appeal with this office that can execute the informal level process. The new 602 form violates the additional one page policy and provides less space to argue the issue. In any event, a response to this matter can be written to me or inserted in the informal and/or first level of this appeal.

Problem Description: The 1/28/2011 NCR violates all inmates' rights to appeal. The informal level already serves the [purpose] of the recommended process [change]. The language described is adequate enough; the new process will allow Correctional Officers to get away with all kinds of misconduct and the process will unduly burden the inmate.

Action Requested: That the [...] changes in the 602 process be abandoned and the regular inmate appeal process be safeguarded and/or any additional relief that deems just.

[SRJ-#1]

RESPONSE: As of the effective date of these regulations, the informal appeal step has been discontinued, and on this basis alone the commenter's choice of grievance resolution is no longer available. Also, the commenter's depiction of the superseded appeal process is distorted in many respects, especially with respect to rejection criteria, interviews and other details. While the commentator seems to extol the virtues of the old informal process he fails to note that it was not trackable, appeals could simply disappear and that by the time the appellant became aware of the situation his time constraints for filing an informal appeal had expired. None of that is now likely since all efforts to resolve problems can be documented using one of several available forms, and appeals are to be submitted directly meaning that time constraints can be tolled pending the acquisition of needed documentation. Attempts to trick or "game" the system, as

SUMMARIES AND RESPONSES TO ORAL AND WRITTEN COMMENTS

seems to be the commenter's actual intent, are hardly made in the spirit of constructive comment, and illustrate how the public comment phase of regulatory adoption subjects the Department to unique, if not outright bizarre, input. The answer to the question "as of this date the changes are a proposal, right?" is NO. Based upon input received during the public comment period, the Department does have the option to make changes accommodating any suggestion or recommendation demonstratively more effective or as effective and less burdensome. The assertions contained in the comment, while no doubt heartfelt, pose no such alternatives other than a non-negotiable demand to abandon the changes outright, on the basis of an assertion that the old policy is adequate enough, through what is hoped to be a procedural loophole. Such submissions, however emotionally satisfying on a personal level they may be, have no basis in fact and contribute nothing substantively.

NCR and Notice Posting Issues

Provide me a copy of NCR 11-02. [M-#1] I went to the library and was given a booklet [brochure?] announcing the changes. I am asking to be sent a copy of the changes made. [GR-#2]

Every time an inmate puts in a complaint/602 appeal it is rejected for not following or filling out forms properly, yet when I ask for a copy of the proper procedures I get no response. [GR-#1]

While it is stipulated that the facility post the notice, this is not being done. [GR-#4]

NCR 11-02 is not posted in the central gym or other common areas. [M-#2]

There were never copies, distribution or postings of the NCR 11-02 at my building. [BRB-#2]

The document was stapled to the bulletin board is printed front and back and to hold it up, staff has stapled it heavily, making it difficult to read. [MH-#1]

There are men in the building who are in wheelchairs and cannot read anything at that level [posted]. My son has trouble standing for any length of time and he had trouble trying to read the new policy. [MH-#1, MH2-#8]

What's to be said and done about staff not posting NCR for Ad Seg inmates to read in time enough [to comment]. [Hou-#8] As of March 21st there are housing units at San Quentin where the NCR has never been posted, so that inmates who will be affected by the changes have not had a chance to read the proposed changes, much less prepare comments before the deadline. [JLT-#3]

Under the Administrative Procedure Act (APA) affected persons are required to be given timely notice so that they can request and attend a public hearing and supply written comments. Without proper notification, the adoption of proposed regulations cannot proceed. Your notice is and has been inadequate [not posted in prisoner housing units nor posted in at or near the law libraries]. Therefore, I request you start at the beginning by providing actual notice to prisoners. If not, it would be inappropriate to proceed with promulgation. This is my formal objection to proceeding with the process. [DF-#1]

We are being provided only the first page of the appeal form and no copies of the request form. The described forms are handed out on only one day and in limited supply, inconsistent with regulations. [M-#3] When inmates asked to see the new 602 forms, they were told that they were being further revised and were not yet available. Since the changes are to the Form 602, inmates and others need to be able to see the proposed new form. [JLT-#4]

They quote section numbers that are not in the pamphlet we have. This does not give inmates a chance to properly prepare a Form 602 or any type of defense to the violations we are being given. [GR-#3]

Provide me with any proposed adoption changes that you might issue. [DF-#12]

RESPONSE: All individual requests for copies of NCR #11-02 were honored prior to the comment closing date. In addition, pursuant to operational practice, upon receipt the NCR is posted at locations accessible to inmates, parolees and employees. Also, facilities are instructed to make the NCR available to inmates in segregated housing who do not have access to posted copies. Finally, the NCR is distributed to the inmate law library and to inmate advisory councils. The Department acknowledges, especially with respect the rule posting, that ADA compliance is essential. That said, maximum access may not been locally achieved, at least initially. Such instances are conceivably the result of unintentional mistakes on the part of individual staff. It is

SUMMARIES AND RESPONSES TO ORAL AND WRITTEN COMMENTS

also important to keep in mind that design characteristics particular to specific settings must also satisfy “the requirement of custodial security and of staff, inmate and public safety” (15 CCR 3270) and have precedence over all other considerations in the operation of all the programs and activities of the institutions and the department. It is possible, therefore, that posting in particular locale on a case specific basis did not occur for legitimate reasons. Nevertheless, location specific instances of access problems can be reported to the appropriate authorities, as a future preventative. However, all other objections aside, the fact of our receipt of the comment is itself evidence of awareness about the changes and that an opportunity to provide input has been properly afforded.

Section 3084.1(e), which mandates the ready availability of appeal forms, is apparently functioning well enough, in that appeal forms are being supplied. Limited distribution of supplemental and ancillary Forms could be legitimate in those instances where the need for additional space or a group appeal is not anticipated, or specifically requested. Otherwise, there is a likelihood of unnecessary waste and oversupply, a problem especially acute to locked facility environments with limited space and where item control is a constant consideration. Also, initial production constraints in some instances made certain forms in short supply, which may be a partial explanation for non-availability of the Form 22. It should be emphasized that its use is optional, that the GA-22 continues in use, and that within a short period of time any system-wide form shortage should have been resolved. Finally, assertion that the forms in question are subject to future revision is correct, but should not have been proffered as an explanation for non-availability. The Department apologizes for any error on the part of staff that may have occurred in this instance.

Inmates and parolees are provided a printed version of the Title 15 Rules and Regulations governing the Department’s Adult Institutions, Programs and Parole. The latest edition of the printed Title 15 was updated through January 1, 2011 and distributed subsequent to that date. As the publication and rule effective date of NCR #11-02 was January 28, 2011, its content would not be contained in the book. In fact, the changes announced in NCR #11-02 will not be reflected in the printed version until the January 1, 2012 edition is distributed. Nevertheless, NCR #11-02 is available in facility and institution law libraries. Moreover, how imperfect access to the rule text would prevent proper form preparation is unclear, inasmuch as the instructions found on the form are designed to be followed without any need to refer to the underlying rules.

Promulgation Without Furnishing Each Prisoner A Copy

Implementation of the regulations without furnishing individual copies to each and every prisoner in accordance with the requirements of Penal Code (PC) Section 2080 (a copy of the rules and regulations ...shall be furnished to each prisoner...) violates that law, due process rights and the 14th Amendment as guaranteed by case law. **[BRB-#1]**

Under the APA affected persons are required to be given timely notice so that they can request and attend a public hearing and supply written comments. Without proper notification, the adoption of proposed regulations cannot proceed. I request you start at the beginning by providing actual notice to prisoners. If not, it would be inappropriate to proceed with promulgation. This is my formal objection to proceeding with the process. **[DF-#1]**

Promulgation of the finalized rules should not occur because you have totally failed to provide proper notice to affected persons, i.e., prisoners. **[DF-#13]**

RESPONSE: The Department satisfies the PC 2080 mandate with the annual publication of the rules and regulations previously mentioned. Persons affected by changes to such rules are notified, pursuant to the APA, via mail (upon request), Intranet posting, publication in the California Regulatory Notice Register and through distribution and postings of the printed NCR (see above). The erroneous notion (here and above) that each and every inmate and parolee must receive a copy of changes before promulgation can occur is analogous to an assertion that no regulation or rule can be adopted by government until and unless each and every affected citizen is provided a copy and afforded the opportunity to comment thereupon. This may be conceptually laudable, but on a practical level, it is wholly absurd and entirely unsupported by law or regulation. Moreover, existing statute specifies that failure to mail notice to any person does not invalidate any state agency action taken pursuant to the APA.

SUMMARIES AND RESPONSES TO ORAL AND WRITTEN COMMENTS

Failure to Allocate Funding Consistent with Constant Growth

The ISOR references needed rule changes made 15 years ago. Conveniently, it fails to mention the CDCR's increasing multi-billion dollar annual budget that coincides with the steady influx of prisoners entering the system. CDCR is generously well-compensated by the taxpayers for each prisoner that it receives each year. As the prison population increases so too does the Department's budget; this is ostensibly extra money for fund the additional prisoners' appeal processing [and material needs]... all that is required to keep pace with the growth. This is not something that happens overnight, but rather over a protracted period. Resources are earmarked each year to alleviate any pressure heaped on the "overwhelmed" system as a result of the increased number of appeals; generally one of the said resources is referred to as staffing. However, it seems that prisoners are being made to suffer due to the Department's inadequate forecasting, poor management and misappropriation of funds. [While] the ISOR identifies a problem identified 15 years ago, yet it only recently revised its 23 year old 602 form. **[KDS-#1]** It should be noted that the number of appeals that seem to burden the CDCR have recently been reduced by virtue of the fact that medical appeals are now processed outside the regular appeal system; medical appeal coordinators [separately function]...as a result of the medical receivership. **[KDS-#5]**

A report by the Legislative Analyst's office [1/24/2011] shows that it appears the Department cannot manage its budget, so why should we presume that they can manage their day to day responsibilities appropriately? **[MH2-#7]**

[Relief...] from medical/health care appeals and the decrease in the number of appeals may file still was not enough, so the Department has also taken the bold step of reducing lines of text needed to accurately describe appeal issues. **[KDS-#6]**

I emphatically and vehemently object to the curtailing of my free speech, simply because the Department does not wish to allocate funding to its appeal system as it observes constant growth in this prison populace. **[KDS-#12]**

RESPONSE: Contrary to any commenter assertion of its failure to do so, the statutory requirements associated with ISOR preparation do not include an expectation of a budgetary or funding rationale or defense of the existence of the agency proposing a regulatory adoption. Additionally, the APA public response process is not meant to be the means by which standing operational practices are accounted for or global or general criticisms replied to substantively. The organizational mission and operation of the Department is subject to the oversight of the Governor, the Legislature, Courts and a myriad of public entities, elected officials and organizations which hold it and its employees accountable. Likewise, demands placed upon the criminal justice system overall are beyond the dictates or control of any single segment of it, including the Department whose responsibilities do not include arrest, prosecution, adjudication or other phases of the criminal justice process outside incarceration and parole. Accordingly, forecasting, management and the establishment of funding priorities are complex and constantly changing propositions, which are very easily (but not necessarily with proper or documented justification), susceptible to being dismissed by members of the general public as "poor" or "misappropriated."

ISOR reference to past problem solutions bear no direct relationship to recent form revisions (see discussion beginning page 12 below) and so the commenter scold above implying that such adjustments should have occurred in the past is especially uncalled for.

Finally, it is true that the need for a separate organizational structure specific to medical appeals has been deemed a necessity by Federal courts and funds accordingly dedicated for this function. However, what is not mentioned or perhaps known to the writer, is the fact that resources which been previously allocated for responding to medical appeals were shifted over to the new Health Care appeals system. They are no longer available for processing non-medical appeals. Additionally the writer makes reference to the Department's budget without addressing how major court decisions have cut into discretionary spending and forced the reduction of many programs. It is in the face of this mounting fiscal pressure that steps were taken to simplify a process that was in danger of being overwhelmed so that it can continue to provide meaningful remedies within the limits of the resources available to it. Safeguards have been built in to

SUMMARIES AND RESPONSES TO ORAL AND WRITTEN COMMENTS

ensure that new regulations simplifying and streamlining the appeal process do not limit an inmates access to remedy but it should be self evident that we lack the resources to provide each offender an unfettered right to engage in free speech by means of a system as costly and complex as the inmate appeals process (see also discussion beginning on page 36).

Objection to Proceeding Under Operational Necessity Provision

CDCR fraudulently used “emergency” processing because the date of form modification and date reflected on the proposed text pre-date the effective date of the new rules. In addition, most laws CDCR cites under the rule history/reference have been law for over 5 years and this does not satisfy the “emergency” processing requirement. **[H-#1, EVW-#1]**

NCR 11-02 enactment 15 months after the revision date of the forms reflects upon the “emergency” matter. Your agency cannot create a form 15 months before a feigned “emergency” need. CDCR has abused [circumvented] the Administrative Procedure Act to promulgate NCR 11-02. **[H-#15, EVW-#12, KDS-#2]**

This duplicitous act has not gone unnoticed. The need for emergency regulations do not last 15 years. **[KDS-#3]**

The Department should not be allowed to change Title 15 as an emergency measure because of their inability to adhere to the law. The Department can call “anything” an emergency and act outside of the law to change it and this is unacceptable. **[MH2-#2]**

I am asking for the justification and reasoning for this change to be implemented outside the normal process – what is the “emergency”? Where is it shown what the emergency is? And the reason there had to be an emergency implementation of the policy? What emergency exists for presenting this change as a fait accompli prior to the public hearing and comment period. **[C1-#1, C2-#1, JLT-#2, SA-#1]**

This policy change does not justify a safety and security issue warranting such implementation. **[C3-#1]**

I was surprised to see that the effective date was the date of publication, before anyone could submit a comment; why ask for comments or hold a hearing when you’ve already made changes. **[JLT-#1, JPF-#1]**

The Department has already put this regulation in place. They’ve gotten rid of all the old appeal forms. They put in the new triplicate carbon-copies forms in place 3 months ago. They changed all the regulations 3 months ago. Then having this public hearing so that OAL can review this seems a little disingenuous three months after the fact. **[CCSO-#5]**

...The revision process has obviously been in process since at least 2009 (dates on the forms). “Emergency seems an inappropriate designation and more of an excuse to prevent a true review and comment. **[JLT-#2]**

Agencies are specifically prohibited from enforcing regulations of general application until they’ve been adopted pursuant to the Administrative Procedure Act and filed with the Secretary of State. These regulations, despite not having been put forth as an emergency adoption, were made effective before the required public hearing. Being that the Department illegally implemented the illegal underground regulations is proof that the Department is proceeding in bad faith. **[JLM-#13]**

Because of the Department’s failure to comply with the requirements of the Administrative Procedure Act, NCR-11-02’s regulations are nullified. **[BRB-#4]**

I look forward to learning that these regulations have been abandoned and you will let the emergency adoption of them to expire. **[DF-#11]**

The prison ran on the TV channel a program about appeal changes; however, the program totally failed to provide any information on them being emergency regulations expiring in 6 months, that there is a written comment and public hearing period and who and where to write with such comments. Indeed, it did not even mention the NCR number. **[DF-#14]**

I hope that comments are seriously considered and this policy changed to reflect the concerns of all citizens, incarcerated or not. **[C3-#2]**

RESPONSE: As operational adjustments to Departmental forms (CDCR Form) are approved, adoption and revision dates (as applicable), are reflected on the form itself. This is long-standing internal practice. However, placement of the revised or newly adopted form into use may be delayed; especially (as is the case in this instance) concurrent regulatory changes are

SUMMARIES AND RESPONSES TO ORAL AND WRITTEN COMMENTS

necessitated. Accordingly, contrary to erroneous and/or misleading commenter assumptions, the difference in form revision date reflected on the forms in question and the adoption date of the emergency regulation has no significance whatsoever. The forms were revised internally and then held until January 28, 2011 when they became effective along with the new rules. Additionally, as a previous response (page 7) explains, the Department has statutory delegation authorizing the adoption of regulations on an emergency basis. This is not extraordinary practice, nor does it convey upon the Department the ability to call anything an emergency in order to make regulatory changes. On the other hand, the stated intent of the Legislature in authorizing the Department exceptional processes for emergency rule adoption is to expedite the exercise of its power to implement regulations as its unique operational circumstances require. Emergency adoptions must be justified and processed by OAL in accordance with statute and regulations. A written statement (Certificate of Operational Necessity) must be filed which includes a description of the underlying facts and an explanation of the operational need to use the emergency rulemaking procedure.

The operational necessity certificate filed with OAL constituted the Department's official statement of justification and reasoning for adoption of this rule on an "emergency" basis. The statement is reproduced here in its substantive entirety:

"This action adopts provisions governing Inmate Appeals. Urgent and immediate operational remedies are needed in order to avoid crisis in the near future. As a system increasingly constrained by fiscal and staffing limitations now common to all public sector functions, but especially acute for this particular department, the sheer volume and complexity of appeals can be overwhelming. In addition to struggling to keep up with the pace of appeals arising from a large, heterogeneous and increasingly challenged correctional environment, improper filings plague the system. Lack of clarity and the absence of streamlining in existing regulatory language contribute to make more burdensome and intense any intentional abuse of the appeal process by manipulative complainants. Additionally, resolution of legitimate grievances can be thwarted due to these outdated and obsolete practices."

"Similarly, loopholes can clog and inefficient practices make costly inconsequential trifles which are prone to grow into organizational headaches and court interventions on the part of the litigationally inclined. In this context, courts have lost patience with past promises to put right identified appeal process inadequacies and now demand the immediate and prompt promulgation of measures overdue for years. Moreover, there will be urgent need on the Department's part to ensure appellants and staff promptly understand process improvements and can effectively complete and submit paperwork requisite to obtaining appropriate and timely action on their problems and concerns."

"Finally, the existing system is strained and overly stressed because inmates and parolees file appeals on matters they perceive as adversely impacting their welfare, but for which they cannot demonstrate a material adverse effect or which are more suitably resolved at a pre-appeal stage, topics the current regulations do not address adequately. As demand on Department's service, personnel, equipment, and facility capabilities already creates extreme peril to the safety of persons and property, failure to adopt this particular action unnecessarily contributes to this risk and may magnify future problems, especially as new crisis dictate rapid reforms and potentially waves of new appeals."

The assertion that most law cited in the authority/reference portion of the rules in question has been in place for years is uncontested. However, there is no significance in this case. The facts and operational conditions necessitating use of the emergency rulemaking process [see above] are not based upon existing nor due to the enactment of new law.

Erroneous commenter assertions that this is an underground regulation may be due to the absence of any specific explanatory content about operational necessity in the NCR or the Notice of Emergency Regulations. Nonetheless, there was no intent to deliberately mislead. In anticipation of promulgation, a general informative video was prepared, released and screened at institutional settings throughout the state (see response heading "training" below). Creation of this production was independent of and separate from rulemaking notification and there was never any intention for it, contrary to the stated assumption, to be inclusive of the notification or comment solicitation process.

SUMMARIES AND RESPONSES TO ORAL AND WRITTEN COMMENTS

Furthermore, the notion that the emergency rule adoption was an attempt to circumvent the public comment process is totally unfounded. The NCR in question plainly states that a public comment period (ending 3/22/2011) had opened, oral comments could be made at a public hearing and that written comments could be submitted during the time frame in question. Likewise, the NCR clarifies that no decision regarding the **permanent** (emphasis added) adoption of the rules are rendered at such hearings. Under the statutory authority permitting emergency adoption of rules by the Department, the initial effective period is 160 days.

During that time period, the Department assessed requests for accommodation received by individuals commenting on the rule change, will notice those commenting of any substantive textual changes/adjustments and then will file with the Secretary of State the final adopted text in fulfillment of various statutory and regulatory requirements.

Failure to Satisfy Gov't Code (GC) § 11349 Requirements/ Request for Specific Finding by OAL

I am submitting "evidentiary" documentation of CDCR employee's lack of "clarity, consistency and performance standard" as is required by the cited statute. [BRB-#5]

Other regulations require a host of information which if not provided will cause rejection or cancellation. This proposed part of the regulation does not meet the "necessity" requirement and is contraindicated by the quantity in information required. [DF-#5]

It is not "necessary" to encumber a prisoner with the expense of postage to mail to Sacramento. [DF-#6]

The requirement that there will be a 3rd level of review before exhaustion of administrative remedies does not comport with the "consistency" requirement. This is because the Department cannot impose exhaustion of administrative remedies by fiat. Because it is the court's, and not the Department's place to determine is a prisoner has exhausted administrative remedies, the APA standard for "necessity" has also not been met [DF-#2]

3084(c) violates the clarity clause absent clarification of what is important and relevant with respect to the word "material." [SD & KB-#6]

We ask that the OAL request the CDCR Secretary to provide clarity on the interpretation of 3086(e)(1). [SD & KB-#15]

When you consider that the audience of the regulations are prisoners and parolees, the "12-font" requirement of 3084.2(a)(2) suffers from failure to satisfy the APA "clarity" standard. [DF-#4]

The proposed part of the regulation regarding the space available...[for appeal explanation and action requested]...is so small there are very few issues that could be adequately presented.

We contend that 3084.1 does not satisfy the clarity standard contained in Title 1, California Code of Regulations, Section 16. It is readily apparent [to us] that the term measurable and demonstrable can be reasonably and logically construed to have more than one meaning. By using the legal definition of material [important or relevant] it grants to coordinators the arbitrary power to determine important to whom and relevant to what. These are highly subjective questions which require an examination of merits to determine. It then proposes that coordinators evaluate the merits with the term material using the definition of measurable or demonstrable. This constructive twist converts the coordinator from format screeners to merit reviewers and empowers them to dismiss an appeal on its merit by declaring it lacks material adverse effect, without interview, debate or fact finding of any sort. [SD & KB-#8]

3084.6(c)(8) and 3084.7(e)(2) appear inconsistent with each other, therefore the "consistency" requirement has not been met. [DF-#7]

The rule limiting the quantity of appeals does not meet the "necessity" requirement because it is not necessary. There are so many errors made by prison officials that it is very easy to identify several appealable issues every week. About all this regulation does is limit the quantity of criticism that employees suffer as a result of their bad conduct. Therefore this proposed regulation is totally unnecessary. [DF-#9]

We request interpretive clarity of 3086(e)(1) under the clarity requirement. [SD & KB-#15]

RESPONSE: Authority and responsibility for the review of regulations and application of the necessity, authority, clarity, consistency, reference and non-duplication APA standards are exclusively vested in the OAL by law. As pages 7 and 13 note, such review occurred prior to the

SUMMARIES AND RESPONSES TO ORAL AND WRITTEN COMMENTS

promulgation date of January 28, 2011. Commenter assertions of inconsistency, lack of clarity, non-necessity or similar “evidence” are grounded in the personalized interpretations of the individual commenter as opposed to any flaw detected by the OAL. Moreover, the standards cited are not intended to be revealed errors, but rather are inclusive of a number of other processing criteria which must be met in order to prevent the return of a rulemaking file to the originating agency (see page 5). Even in the event of deficiencies, agencies have the option of correcting such matters and proceeding with the rulemaking process. Under separate procedures for regulatory determinations, written requests as to whether a state agency rule satisfies the definition of a regulation may be filed directly with the OAL. Finally, the APA states that there should be no substitution of OAL or court judgment for that of the rulemaking agency as expressed in the substantive content of adoption regulations.

Above and beyond the foregoing, the specific objection to the regulations referencing “exhaustion of administrative remedies” fails to grasp the intent of this language.

- While it is true that the courts set what is deemed to be “exhaustion” they do so in reliance on how the state defines its appeal system. For clarity we have put forward not only the structure of the appeal process but how in every circumstance an appellant can know that they have completed the process for purposes of exhaustion.
- An objection is also raised to the requirement that appeal issues be measurable or quantifiable and contends that this introduces some subjectivity into the process that can be used to disadvantage the offender population. In fact this language was added to provide a basis for rejecting appeals which provide little or no evidence of harm and therefore no basis for any relief. Continuing to process these appeals as was done previously, merely leads to pro forma responses and denial. The process of rejection involves returning the appeal to the offender with directions to provide such information as is necessary for obtaining a meaningful response. Although somewhat subjective, the appellant is a part of the discussion and is provide ample opportunity to correct any deficiencies which impede the processing of his or her appeal.
- Lastly, concerns about limitation on the space available are addressed in the Department Operations Manual which grants to the appeals coordinator the authority to allow additional Form 602-As upon presentation of a compelling need for more space.

Failure to Satisfy GC § 11440 Requirements

No administrative remedies are available to obtain a judicial declaration of the regulation’s validity as authorized by the cited statute. [BRB-#6]

RESPONSE: GC §11400.20(a) specifically exempts any agency from adopting administrative adjudication regulations unless otherwise authorized by statute. CDCR has no such statutory authority. In addition, since there is no deprivation of citizen liberty or property interest outside of the criminal justice system, creation of an adjudication process for the general public overseen by administrative law judges is not warranted under current law.

Training

If anyone should be held responsible [for errors] it should be the appeals office for implementing a new appeal system without providing instructions for use. [Hou-#1]

RESPONSE: In anticipation of the announced changes, the Inmate Appeals Branch (IAB) ensured that Departmental custodial and parole academy curriculum together with On-the-Job (OJT) and In-service training (IST) modules were developed and delivered to staff both prior and subsequent to the effective date of the rules in question. Additionally, IAB spearhead the development and delivery of offender informational aids including brochures and an eight to ten minute (depending on language version) visual media broadcast throughout custody settings. Likewise, Appeal Coordinators and their staff received specialized training and orientations for months prior to and continuing after the date of implementation.

It is erroneous and misleading, therefore, to allege instructions for use have not been provided. In some instances, training delivery may not have been as universal as desired prior to the

SUMMARIES AND RESPONSES TO ORAL AND WRITTEN COMMENTS

January 28th effective date. However, within a reasonable time frame, the Department is confident that all concerned will be sufficiently informed about changes to be able to effectively make use of the appeal and written request process. Fiscal constraints (as alluded to in the ISOR, page 2) dictated that the training effort described was the best that could be delivered under prevailing circumstances. Finally, further training and guidance will build upon the receipt of public comment, wherein interpretation and implementation wrinkles, omissions and misunderstandings can be rectified, as pointed out on pages 6 - 7.

One could further note (see page 2) that the previous process has not been substantially altered. Whereas in the past an inmate would submit an informal appeal to address a problem, for which they received no receipt, which was not tracked and which could impact their ability to meet time constraints, they now have access to a problem resolution process which provides a receipt, provides for a supervisor's review and which does not impact their ability to meet time constraints. The only difference from the user end is that they use a problem resolution process instead of the appeals process to obtain an item, services or access to staff. This requires minimal training.

Unnecessary Cost Increase

The changes are unnecessary, a cost increase to the taxpayer and a workload increase for staff. Workload impact on staff will more than double, and the total cost, from beginning to end, when handling an inmate appeal will increase dramatically. Therefore, our organization opposes this new regulation change concerning inmate appeals. [CCSO-#1]

Don't waste money changing/limiting the 602 process. [JPF-#6]

The notice of Emergency Regulations fiscal impact assertion of "none" on page 2 is apparently misleading in light of the fact that the proposed regulations call for new forms (602A, 602G) and these new forms will require the production of new forms and it is certain that the cost of this will not be none. [MB-#1, JP-#1]

RESPONSE: As ISOR page 2 notes, the adjustments in question respond in part to diminishing organizational resources and growing fiscal constraints. Also, discontinuation of the informal appeal step and introduction of the written request process is intended to be a potentially less costly means for addressing a number of demands outside the appeals process. While there are now more kinds of appeal forms, the Department's expectation is that there should be decreasing numbers of appeals as matters are resolved outside the appeals process, with a net savings over time. Also, while the new request form entails a new printing effort, appeal forms will no longer be used for such purposes, and the existing Form GA-22 will continue in use for requests not requiring the level of documentation the CDCR Form 22 affords. So at worst, the Department believes printing costs will balance out eventually, even if some overall savings are not realized. Statistics on past form use are unreliable because the GA-22 is produced locally (as well as printed statewide) and past trends on appeal form use (for the reasons noted above) should not be the basis for future projections. Therefore certification of fiscal impact is correct, because the Department estimates that there will be no increased cost to the agency. Staff who once responded to GA 22s or informal 602s will now respond to the CDCR Form 602 regarding the same issues. Supervisors who once authored First Level appeal responses will now provide the review and documentation that will simplify any future appeal response as well as having an opportunity to resolve the issue locally and avoid the cost and effort of dealing with a future appeal. Furthermore, short-term costs can be absorbed and/or accomplished through cost savings realized elsewhere, again with no net increase.

Deliberating Discouraging the Numbers of 602 Filings

Only about a dozen inmates statewide abuse the appeal process (according to the source asked). Yet much in the changes in question is designed to prevent and discourage filing. If indeed abuse is confined to a modest number, it is unnecessary to set up new limits.

- The vast majority already does not file any appeals and those that occasionally file are too easily talked into withdrawing the appeal at the earliest level. [JLT-#8]

SUMMARIES AND RESPONSES TO ORAL AND WRITTEN COMMENTS

- Many times I have heard CDCR administrators say that an issue must not be a problem because they have not received many appeals on it. The attempt to reduce the number of 602s will further conceal the nature and prevalence of problems. [JLT-#10]
Being barred from appeals...it will start taking more court actions to have grievances addressed. [JDR-#11]

RESPONSE: Reasons for constraining the frequency of filed appeals has been provided on ISOR page 6, and the number of "frequent filers" clearly exceeds more than a dozen individuals statewide. Depending on how categorized, the number is at least in the hundreds (if not greater). Appeal withdrawal is subject to more than one interpretation, in addition to those provided by commenters, and ideally can be the consequence of satisfactory resolution of a grievance, no longer necessitating completion of the appeal process. Also, 3084.6(f) affords appellants the added protection of appealing the failure to receive promised relief, if such had been granted, but not delivered. It should be additionally noted that part of the rationale for introducing a written request process is to document the nature and prevalence of problems at the pre-appeal stage, previously imperfectly detected at the informal step. Therefore, despite commenter reservations, the changes will, as opposed to concealing, actually reveal more problems together with under- and un-addressed matters warranting attention via the written request process. Noted elsewhere in this document (pg. 6) is the fact that the total number of possible appeals, taking different categories in account, increase as opposed to decrease. This is more likely to result in fewer, as opposed to more court actions, to have grievances addressed. Vexatious appellants, although not numerous compared to other appellants, were diverting a significant amount of resources to address often repetitive or pointless appeals. This undermined the ability of staff to give needed attention to more worthy and pressing appeals. ISOR page 6 emphasized this point.

Reprisals for Filing Appeals

Reprisals within the Department against inmates who file appeals is ongoing. These reprisals are taken against inmates even if they do not file an appeal, but if their families file complaints. Many inmates will not file an appeal due to fear of reprisal, leaving it up to other inmates to hopefully file an appeal which relates to their issues. It happens frequently and it is not limited to one institution, it is a statewide problem. Inmates have been reprimanded and told that it would only get worse unless they stopped their families from complaining. [MH2-#5]

Inmates try to stay below the radar and not invite staff attention even in a situation where a 602 would have merit and the appropriate course of action because they are afraid of making waves and bringing outright retaliation upon themselves. [JLT-#9]

Despite being specifically prohibited, staff reprisal for having filed an appeal is commonplace. [JLM-#8] Staff reprisals for un-filed appeals aren't specifically prohibited and appeals staff prevents most appeals from getting filed, thereby leaving the inmates who submitted them subject to un-prohibited reprisals. [JLM-#9] A series of events related by the commenter involving the mailroom and informal appeal submissions about reprisals are offered in support of the contention that, in not being able to demonstrate a material adverse effect, unprofessional, disrespectful and retaliatory activity on the part of staff would be appealed under the new rules.

[JLM-#10]

Most prisoners submit very few or no appeals as they are, rightly so, afraid of retaliation. [DF-#9]

RESPONSE: Reprisals against offenders for filing appeals have been and shall continue to be prohibited under these rules [3084.1(d)]. Specific instances of reprisal or threats of reprisal documented in a staff complaint [3084.9(i)] affords the Department the opportunity to examine such claims and to initiate appropriate action(s), including disciplinary sanctions against those staff found to have engaged in such misconduct. General assertions of wrongdoing cannot be addressed in this document because they do not constitute a recommendation for rule change that can be accommodated. In particular, the Department disregards any and all blanket or unsubstantiated accusations of misconduct on the part of correctional personnel or other staff. Specific instances of disrespect or appeal repression should be reported to superiors, and ideally the immediate supervisor of the staff in question, if not filed as a staff complaint. Remaining silent

SUMMARIES AND RESPONSES TO ORAL AND WRITTEN COMMENTS

denies the Department any opportunity to more completely assess the nature and scope of problems, as perceived by a complainant.

Appeal Rejections Due to Not Following New Procedures

Our appeals are being rejected for not following new procedures which we have not been instructed on. We do not have access to the informational video being screened. Not only are our appeals being rejected but we are also being threatened with consequences for improper processing or missed dates activated by our rejection attempts. Are you in agreement with inmates suffering consequences for not following the new system when they had no knowledge of changes beforehand and upon request were not provided with them? **[Hou-#2, Hou-#7]**

The Appeals Office is [...unfairly...] enforcing the regulations to the extreme while a thick cloud of confusion envelopes my building as the unseen new appeals rules and regulations conflict with the content of the newly distributed Title 15 pamphlet. **[BRB-#3]**

RESPONSE: While it is possible that appeals may be rejected for not following new procedure, such a statement by itself may be somewhat misleading. Rejected appeals may later be accepted [3984.6(a)(2)] if the reasons for rejection are corrected (such as improper form use). Appeal coordinators have been instructed to exercise caution during the period of transition to the new rules so as not to duly foreclose appeal options. The appearance of cautionary language about improper processing or missed dates is also normal to the appeal process and would appear regardless of new rule adoption. The Department is confident that no appellant will suffer meaningful consequences for not following new rules during the transitional period since the act of filing the appeal captures time constraints and the appellant need only to correct deficiencies noted to have their appeal accepted and processed.

Textual Complexity

Legal nuances contained in the proposed regulatory language increase reader difficulty. Much of the revised appeal regulatory language is exclusive and intimidating in its legal nuance, rather than inclusive. It lacks clarity and is too complex for the average prisoner to fully comprehend and comply with. Few, if any inmates with a seventh grade education or less are able to understand and adhere to the instructions as written. Many phrases are laced with legalized nuances that are too complex, opaque, and confusing for the average inmate to effectively comprehend or understand how the regulation requires them to plead their grievance. Therefore, the regulatory language should be written more plainly so that it is accessible to the average inmate. **[DSM-#3, JLT-#12, MB-#3, JP-#3]**

The average inmate reads at a 7th grade level and while they may be able to read Title 15, the question is, do they understand it? **[MH2-#3]**

I have a very difficult time understanding the new regulations and appeal forms. Inmates like me are not highly educated and have learning disabilities. **[SM-#1]**

This rule change is very difficult to grasp, not even Department officials understand the process. Please review and revise to meet a concise standard. **[DS-#1]**

Do not impose this new appeal process until further consideration is given as to how it disadvantages prisoners who are not mentally advanced. **[MS-#1]**

This policy doesn't only affect the less than above average intellect. It isn't only about a 9.0 GPA, but also about maturity level, emotional stability, ability to cope and ability to express themselves, while also trying to deal with their frustration for the wrong they feel done to them what overwhelms most inmates. **[JDR-#4]**

These regulations propose strict, precise and concise rules for filing. This is done with full knowledge that a vast majority of inmates are functionally illiterate or possess poor literacy skills, which may not allow them to articulate their grievances in the precise and concise manner these regulations require. **[SD & KB-#3, SD & KB-#4]**

RESPONSE: As observed previously, these rules build incrementally upon those already in effect. Changes and additions are clarifying substantial inadequacies and address the need for particular and/or specific verbiage the necessity for which has been derived or demonstrated

SUMMARIES AND RESPONSES TO ORAL AND WRITTEN COMMENTS

directly over time from experiences and controversies associated with actual appeal submissions. Notwithstanding any “plain language” rule ideal, the need for increased legal “nuance” corrects two problems that have been encountered over time: (1) overly imprecise language, and (2) insufficient rule detail. In other words, without strict, precise and concise rules for filing, unfocused, open-ended and irresolvable grievances, are then a possibility, if not a certainty. Accordingly, a more effective and/or less burdensome alternative is not available. Also, as ISOR page 5 points out, affording offenders equal access to the appeals process is a continuing mandate of the rules. Therefore, those individuals having difficulty understanding the rules, suffering identifiable emotional and/or physical disabilities or otherwise intimidated by the complexity or formality of the rules can and will upon request receive that assistance needed to be able to participate in the process. Finally, while admittedly more detailed, these rules for the most part continue or are based on past verbiage, implying no greater reading burden than any that may already be encountered by those relying on the content in question.

Incorrect Basis of Citation/Reference/Acknowledgement and Violation of Code of Federal Regulations Provisions

The proposed regulations fail to cite, refer to or otherwise even acknowledge Part 40, Sections 40.1 through 40.22 in Title 28 of the Code of Federal Regulations (28 CFR) even though that particular federal legal authority seems to be what actually governs the minimum standards for all inmate grievance procedures provided to inmates in all state and federal correctional institutions and agencies pursuant to and in accordance with the Federal Civil Rights of Institutionalized Persons Act. **[ECRK-#2]** Additionally, CDCR has failed to:

- Afford inmates an advisory role in the formulation and implementation of the new procedure in accordance with 28 CFR. **[ECRK-#4]**
- Include any language which gives inmates an advisory role in the operation of the new grievance system at the institution in violation of 28 CFR. **[ECRK-#5]**
- Include any language that assures the confidentiality of records regarding the participation of inmates in the proceeding of the new grievance procedure in violation of 28 CFR. **[ECRK-#6]**
- Ensure that the language of 3084(c) complies with the requirements of 28 CFR. **[ECRK-#9]**
- Include the word “meaningful” before the word “remedy” in conformity with 28 CFR. **[ECRK-#11]**
- Ensure that the “health, safety or welfare” clause is consistent with the requirements of 28 CFR. **[ECRK-#14]**
- Include assurance that good faith use or participation in the grievance system will not result in reprisal, in accordance with the requirements of 28 CFR. **[ECRK-#18]**
- Comply with the 28 CFR requirement that forms shall encourage a simple and straightforward statement of the grievance. **[ECRK-#21]**
- Avoid creating an unnecessary technical form compliance in violation of 28 CFR. **[ECRK-#29]**
- Accord indigent inmates automatic requests for review by a person or entity not under institutional supervision or control for final level review/exhaustion as required by 28 CFR **[ECRK-#33]**
- Accord a grievant the right to move to the next stage of the process upon expiration of a time limit at any stage, unless notified of an extension time for a response, as required by 28 CFR **[ECRK-#51, ECRK-#54]**
- Prohibit, in any capacity, the participation of employees involved in the matter involvement in the resolution of the grievance, as 28 CFR requires. **[ECRK-#52]**
- Include any language requiring appeals to be completed within no more than six months from when they were initiated as is required by 28 CFR. **[ECRK-#55]**
- Limit the appeal coordinator’s responsibilities in emergency grievances to that of immediately forwarding, without substantive review, for corrective action in accordance with 28 CFR. **[ECRK-#59]**

RESPONSE: Under the American system of Federalism, governments function in separate spheres of authority: National, state and local. Contrary to the assumption stated by the commenter, California’s Code of Regulations (CCR) respecting it’s prison system have not been

SUMMARIES AND RESPONSES TO ORAL AND WRITTEN COMMENTS

superseded by the Code of Federal Regulations (CFR). The CFR title cited (28) applies principally to the Federal Bureau of Prisons and would conceivably affect state jurisdictions only in the absence (not applicable in the case of California) of state-level rules implementing statutory authority granted to it by the Legislature for the administration of its prison system. Furthermore, the CCR title in question (15) is well-established and strongly grounded in both Federal and state statutory and case-law provisions applicable to offender appeal systems. Finally, no federal court has ever ruled that California's offender appeal system must conform to CFR provisions. Nevertheless, each substantive comment listed above has also been addressed in other following portions of this document.

Section 3000: Missing Definition

Use of the word "offender" at 3084.2(f) and elsewhere through NCR #11-02 is neither in accord with nor anticipated by the definitions of "inmate," "prisoner," and "parolee" currently set forth in the Definitions set forth in Section 3000. [ECRK-#24]

RESPONSE: Consistent with other recently adopted Title 15 regulations (see in particular, Chapter 1, Article 6.7 Transfer of Inmate Assessment Responsibility), the word "offender" has been introduced as shorthand for an individual (adult or juvenile) under Departmental custody or parole supervision, or a prisoner. This word is more useful given the increased variety of possible programs and populations. Old terms are sometimes too specific to accommodate these new populations therefore the use of a more generic term helps prevents the regulations from become obsolete. Therefore, since usage of the word has already been accepted without the need for an accompanying definition in Section 3000, the accommodation is unnecessary.

Form 602 Instructions

Adjust the text of the CDCR Form 602 instructions as follows:

- "California Code of Regulations" and (CCR) is misplaced. [ECRK-#23]
- Replace "lead" with "led" [ECRK-#24]

RESPONSE: These suggestions are accepted, see page 1.

Other Forms

The reverse side of the CDC-115 and CDC-115-A forms should be updated to reflect the new 30 day time limit for filing appeals (a 15-day time limit is currently specified). [SH-#6]

RESPONSE: Information regarding the two forms in question will be forwarded to the responsible program for review and possible revision(s).

Retain Existing 602/Existing 3084.2(a)

My complaint is that the newly designed appeal form is very complicated and the requirements are beyond my capabilities. [This undermines my capacity...] to defend my legal rights and [...to comply with the requirements...] of prison policy. The original appeal form and appeal process was clear and facilitated/enabled me to appeal in an orderly fashion. [MS-#2]

I completely object to the redesigned forms. [C3-#4]

Current regulations require that the appellant "describe the problem and action requested." The Department has not demonstrated that this regulation is not adequate in its current form. [CCW-#2]

RESPONSE: An explanation of the necessity for form redesign appears on Page 3 of the ISOR. Retention of the existing form and process is not a more effective alternative from the Department's perspective, and to do so would be the equivalent of taking no action whatsoever, contrary to the intent expressed in NCR #11-02. Arguably, the 602 form is no more complicated than previously, inasmuch as much of the newly added content is for staff use only and that additional lined space available for appellant use is now found on the 602-A. What may be from a commenter's perspective as the "clear and adequate" nature of the existing rule poses

SUMMARIES AND RESPONSES TO ORAL AND WRITTEN COMMENTS

considerable difficulty for the Department from the standpoint of its excessive open-endedness and vagueness with respect to many critically important details, as is repetitively emphasized in this document. As a result, issue specificity is now required where previous regulatory text was imprecise and a place for the subject of the appeal to be provided has been expressly added. As with most changes, the Department expects some expressed preference for old practices until users become familiar with new expectations and procedures.

Form 602 Space Limitations

The stated ISOR goal of process streamlining is belied by the fact that the space available on the Form 602 to state the problem will force the use of the continuation page (602A), adding a second sheet of paper when in the past one page was sufficient. **[JLT-#6]**

Surely, reading one additional page cannot possibly be classified as an “undue burden,” when it comes to such a basic right as petition for redress of one’s grievance against the government. In fact, this right was considered so important it was included in the 1st amendment by the founding fathers. **[WR-#4]**

The space available to describe the problem has been so severely truncated that it will be a real challenge to adequately describe the problem, even if the 602A is used. Since the first step is solving a problem is properly describing it, more space is needed. There is more than enough space for the responses to 1st and 2nd level, but not enough to describe the situation at the outset, which means that more 602s will be unclear and require much back and forth and (probably) the filing of additional 602s to deal with the problem. **[JLT-#11]**

Objection to the amount of space available to write original complaint. There is not enough room to list all parties involved by name, title, issue, policy affected and citation of policy/reg/law. **[KC+CM-#1]**

The appeals form and the other forms of the 602 series must be modified to provide prisoners with more space in which to state the grievance. The new form provides less than one-quarter of the space compared to the previous scheme. Not all prisoners are skilled writers able to concisely set forth all matters related to a grievance. **[SF-#9]**

The new forms are not acceptable for prisoners to voice their grievances. They are required to use a 12-point font (where the CDCR uses 9-point), and your reasoning is so that it will be readable? As you know, this will reduce the amount of words they can use. Also the number of lines and the width of the area they have to write their grievances have been greatly reduced. They have to have room to state everything and cite the evidence. This does not give them near enough room to list everything that is required of them and once a grievance is filed, another complaint cannot be added or amended. **[BB-#1, VLD-#1, WR-#3]**

It looks to me that the new layout of the Form 602 cuts down the space available for the inmate to explain their issue. Since there is so little room for explanation in “A” there is now a greater chance for the need of the 602-A form. Design and review another 602 as this one is clearly a very poor design. **[D-#1, H-#8]**

Most inmates are below ninth grade level in reading and writing skills are you are further restricting them. In fact, the area for the inmate [to use] should be enlarged while the area for CDCR response should be smaller, since they use 9 font in their replies. **[VLD-#1]**

On a regularly spaced, typed piece of paper, an appellant has 110 lines to work with. On ruled notebook paper, 68 lines (front & back). The new forms significantly reduce the available space to a fraction of this. The writer implores the reader to review 602’s that advanced to the courts in critical cases (Valdivia, Plata, Armstrong, Clark, Madrid, Coleman, etc.) to be disabused of the opinion that this allows enough space to prepare a bona fide appeal. **[RT-#2]**

Instead of allowing appellants to keep filing appeals on the old Form 602 and if needed to continue on one extra sheet of paper, front and back, the 602 and 602-A forms provides less than 22 lines of text that do not extend fully across the pages of each form. The lines are truncated by a “STAFF USE ONLY” section. **[KDS-#7]**

Bottom line, the revised 602 and new 602-A provide only 14.36% of the space currently available in section A for problem description. For this excessive restriction on space go uncorrected would be an unacceptable injustice. It would effectively silence an inmate’s ability to give voice to an otherwise meritorious issue. **[DSM-#1, JLT-#11]**

SUMMARIES AND RESPONSES TO ORAL AND WRITTEN COMMENTS

The proposed Form 602 offers 68.64% less space for the explanation of issue in block A, compelling appellants to resort to using the 602-A on even the simplest of appeal issues. This translates into CDCR having to process twice the amount of paperwork than is presently needed even on the simplest of appeal issues, inconsistent with the objective of reducing appeal backlog.

[Mic-#1, H-#8]

Reductions in area make it virtually impossible to delineate any complex matter, particularly disciplinary appeals, almost certainly guaranteeing that such appeals will fail. **[WR-#2]**

The 602 and 602-A provide an extraordinarily extravagant amount of space to explain why the inmate is dissatisfied with the first and second level responses. This wasted space could be better put to use if reformatted to provide additional space for issue explanation, and still leave sufficient space to explain dissatisfaction with 1st and 2nd level responses. **[DSM-#2]**

Ensure the same amount of space for the same amount of typed characters as they had on the previous form 602 and attachment. **[LN-#2, KC+CM-#3]**

There is a space shortage in Section A of the 602 and 602-A, particularly in cases where a prisoner might be required to itemize improperly seized and converted personal property **[BKB-#1]**

I object to the amount of space available for prisoners to write their initial complaint. There is not enough room to list all parties involved by name, title, the issue, the policy affected and also cite the policy, regulation and law violated. Inmate 602's are constantly being denied because they fail to corroborate their complaint and restricting the amount of information they can put on a 602 only makes it harder to prove their point. Change the form to ensure there is the same amount of space and the same amount of typed characters as they had on the previous form and 602 attachment. **[MH2-#11]**

The space designated "staff use only" lacks lines or instructions and because of the shape it would be very hard for staff to write in this space. **[D-#2]**

Amend subsection 3084.2(a) as follows: (a) The appellant shall be limited to one continuation page, front and back, or may use a CDCR Form 602 (Rev. 08/09), Inmate/Parolee Appeal, to describe the specific issue under appeal and the relief requested. Analysis by the commenter suggests that the Forms CDCR-602 and 602-A constitute a significant reduction in the space for the description of problem and action requested currently available appellants on the CDC 602 (12/87) under existing 3084.2(a)(1). This represents a material adverse effect upon the appellant's procedural right to grieve. It micro-manages the Prison Litigation Reform Act's rotation to the left, whereby there isn't a whole page on either form to litigate with or enough room needed to rebut the disputed evidence in legal terms. Such room is essential to counteract the effect of evidence introduced by the other side in question. Such an ill remedy infringes upon prisoner's right of access to the court, and is a direct violation of minimum standards for publication of Rules for the Prisoner's Grievance Procedures (Cited: 28 CFR 40.1 and others).

[T-#1]

These regulations are unfair because now much more information (involved employees, specific facts about the issue, etc.) must be included and done so in a much more limited space. Conversely, the space provided for the action requested is extremely generous; no one needs that much writing space to request relief. In fact, there is now the same amount of writing space to describe the problem and request an action. Modify the 602-A so as to provide more writing space to describe the problem and less for the action requested. This is reasonable in light of the fact that an inmate can bring only one issue per appeal, indicating that as much writing space to request specific relief is not needed. **[L-#1]**

The space restrictions are burdensome because all the detail and factual specificity mandated in subsections (3) and (4) of 3084.2(a). With half-inch margins all the way around, the entire front and approximately two-thirds of three-fourths of the back of the Form 602-A should be for section A, with the remaining third or fourth portion on the back of the 602-A beings only for Section B.

[ECRK-#25, JLT-#11]

As for sections D and F, create a second Form 602 attachment page (possibly a Form 602-A2) with the entire front being for Section D and the entire back being for Section F. This second attachment page could be provided by appeals staff when an appeal is returned to an inmate for a parolee with a First Level Response. **[ECRK-#26]**

Some issues require more space to describe problems... **[H-#8, EVW-#7, JLM-#12]]**

SUMMARIES AND RESPONSES TO ORAL AND WRITTEN COMMENTS

The limit on the space allowed is inadequate to address many issues. Prior to the new regulations, prisoners could attach one page to continue writing complaints. Now we are forced to put all of the information in a few lines in the 602 and 602A. Whoever figured out this new system had to have consciously designed the new process to severely restrict prisoners' ability to properly address any issues they have and greatly restrict the frequency of filing appeals. [EDC-#6]

The proposed paper and font size requirements place an added burden as the new requirements also require demonstrating a "material adverse effect." [DAP-#2]

There aren't enough lines dedicated to Section A, additionally too many lines for Sections B, D and F. Given the increased list of what must be complied with, most will not be able to adequately explain in the space provided. If any little thing is not spelled out to the coordinator's satisfaction, it will be screened out. We need more space. I suggest the 602-A form just be lines, front and back. The lines coupled with the new formatting requirements of 3084.2 should accomplish the legibility objective while providing the space necessary to comply with all requirements. [JDR-#1]

The purpose of these rule changes are obvious: to limit inmates to such a degree that exhausting an issue to the courts' satisfaction will be impossible. However, with such an inadequate grievance system, it is the CDCR that will ultimately suffer because the CDCR will not know what's coming until the lawsuit is filed. [RT-#3]

Less than 22 lines of text is not nearly enough space to describe a problem. Even a one-page legal brief submitted to a court provides a minimum of 28 lines. Being that many appeals are qualified as a form of pleading prior to entering a court, the new appeal regulations severely curtails an appellant's [...federal constitutional...] rights. It is my intent to preserve this issue since it is plausible that the Department will invariably respond to future appeals using more pages in its rebuttals than appellants are allowed to use when initially filing appeals using the new forms. The Department's limitations place on appellants, while allowing unlimited space for itself to respond, does not create a level playing field where many appeal issues of an adversary nature between the Department and the appellant. [KDS-#9]

There is no limit on how long a staff response can be, so why have a double standard and limit the inmate's ability to explain the issue at hand? [D-#3]

In the interest of being fair, do not shorten the 602. This will directly affect so many prisoners who are trying to be heard; what outlets do they have if not [for] this? [GS-#1]

In this time of fiscal crisis it makes more sense to allow appellants to use extra pieces of bank paper for continuation space and group appeals as the previous regulations permitted. [MB-#2, JP-#2]

People should be able to use more than one 602A or attach an additional sheet of paper, so long as the need is legitimate. [WR-#5]

Permitting a little more than a full page, as the now repealed regulations did, recognized that prisoners may need more than a tiny amount of space to state their concern. [SF-#10]

I express distress and objection to the changes in the form 602. [DAP-#1]

Inmates presently have difficulty in securing the level of access to justice and the protection of their rights that is intended for them under the US Constitution and the intended level, is more often than not, denied them. The net effect of what might seem like a small change would in fact be a very significant change in limiting the ability of inmates to explain issues that arise which may have compromised their guaranteed rights. The additional time required to read an inmate's concerns on the current form, versus the very slightly reduced time to read their concerns on the revised form would reduce the clarity with which the issues surrounding them can be conveyed.

The effect would be that valid concerns would more often be overlooked, or concerns that were not clearly expressed would require more investigation of the part of staff to understand. The additional time burden associated with the use of the current versus the proposed form is weighted much more on the inmate's part in drafting their concerns than on Department staff in reading them. The cost of staff having to investigate to learn more concerning a valid issue, that would have been more clearly explained on the current form than on the proposed would be a cost burden that exceeds any possible savings resulting from the change. Omitting additional investigation, where an issue might hold validity, would result in further compromising compliance with the intentions of the Constitution. [DM-#2]

SUMMARIES AND RESPONSES TO ORAL AND WRITTEN COMMENTS

The physical space in which an inarticulate person can fully explain their problem has been greatly limited. Coordinators [could] contend in these instances the inmates can turn to unit counselors for assistance. They will never fulfill this role because counselors have a caseload that would terrify a big city public defender. The department should [as an alternative] create Inmate Grievance Clerks: A group of qualified inmates who would be authorized to prepare appeals for inmates with difficulties communicating. Rules allow inmates to assist in appeal preparation, but not throughout the entire process. A formalized structure would complete a gap in 3084.1.(c) as well as alleviate the compensation by using Inmate Welfare Funds to pay clerks. It would also provide much needed job positions and work experience for inmates. [SD & KB-#10]

RESPONSE: Generally, all commenters object in common to changes in the appeal form series, in which it is perceived that previously available space has been truncated, prior latitude permitting additional sheets discontinued and too much space has been devoted for staff use only.

- The reduction in space and constraints in font size was considered necessary to deter those appellants who expansively and often needlessly argued the merits of their case in circumambulatory language, introducing speculations and a host of corollary issues that made it difficult, time consuming, and at times impossible to identify the real or core issue and thereby provide a reasoned response.
- This common abuse had significantly compromised the integrity of the process and overwhelmed existing resources. In most instances the space allotted on the redesigned and new forms will be more than sufficient to identify the issue appealed and provide the necessary supporting facts and arguments. If additional space is required, the 602-A form has been introduced to facilitate the continuation of needed narrative, information and/or the details respecting involved parties, relevant policy and associated matters. If this is not done succulently or clearly, the appeal will be returned to the appellant to be rewritten. Nevertheless, the rule-specified 30-day time constraint will have been deemed met, and the resubmitted appeal will be able to be processed accordingly.
- In and of itself greater form detail obviously does not belie streamlining, in that the absence of sufficient pertinent information necessary for problem identification and requested resolution impeded processing and amounted to an unnecessary obstacle to reaching outcomes effectively and efficiently. This deficiency has been corrected by conscious design. Therefore, inasmuch as the basis for the form redesign suggestions posed are not more effective or as effective and less burdensome, all are declined.
- Aside from the fact that the Founders are not the originators of the First Amendment, the practice of permitting "one" additional page (front and back) fostered a variety of abuses as discussed elsewhere in this document.
- The notion that inmates should be afforded more and the Department less space (through form redesign, allowance of blank pages, or rule amendment) amounts to nothing more than a demand for the status quo to be maintained, which is not a more effective or as effective and less burdensome alternative.
- Likewise, the notion that 602 submissions, as the basis of critical case outcome, were so because unlimited space was available is an unfounded assertion. Plainly, the cases in question advanced because of the nature of the interest at issue, the assistance of legal advocacy and the facts in question which determined the court's findings in that particular instance.
- Also, commenter linking of the appeals process and litigation aside, the two are actually entirely separate matters. Surely, the point of filing an appeal should be the successful resolution of a grievance, not (as is plainly the apparent assumption by this and other commenters) to set up a lawsuit. Demands for a "level playing field" and/or preservation of the "right of court access" are more revealing of a litigious predisposition than perhaps the commenters in question should have prudently expressed.
- Finally, establishing "inmate grievance clerks" poses greater peril than solution. Any relationship formalizing inmate dependency upon other inmates carries with it the risk of exploitation and manipulation. This is such a major penological concern that the matter of

SUMMARIES AND RESPONSES TO ORAL AND WRITTEN COMMENTS

undue influence and special consideration is addressed by other regulations (15 CCR §3010 and §3013, for example).

The concerns raised here also reflects the problem inherent in enacting regulatory changes without simultaneously publishing the operations manual that instructs staff in how to apply them (see discussion pages 6-7).

- It is true that the forms contain less space for arguing the appellant's case despite requirements that the appellants provide as many facts as necessary to substantiate their claims. However, each level of appeal shall be operationally guided to afford appellants, upon presentation of compelling need for additional space either to provide additional facts or better argue the merits of the case, the use of one or more additional 602As (or even blank pages, if necessary).
- The reasons for vesting this discretion at every level is that it makes no sense for the Department to create a limitation that could so easily be demonstrated as an undue constraint on an inmate's ability to reasonably argue his case. If there is any chance of that happening one or more additional 602As may be authorized and the Third Level of Review will be the last word on every appeal as to whether a lack of space has adversely affected the inmates right to argue the merits of their case and whether additional space should be allowed.

Form 602 Tracking Method

According to the ISOR, CDCR never lost nor refused to respond to an appeal, but because no tracking system was in place administrative review could be circumvented and time constraints bypassed at the informal stage. CDCR has not addressed the appeal tracking problem with regards to appeals submitted directly to the AC office through the institution's internal mail system. In such instances, there is no receipt or record created to prove that the appeal was in fact submitted and CDCR also has no way to refute an inmate allegation that an appeal was submitted. The only controversies that arose in court with regard to appeals being allegedly lost or not responded to were only those appeals submitted for an informal level review. In fact, the majority of appeals are lost by the AC office. In the majority of cases when the appeal was not lost, the AC office simply held on to the appeal past the filing deadline, then stamped the appeal as "received" and then rejected it by alleging that the filing was past deadline. This in turn kills the appeal outright because there is no way to cure a time bared appeal.

To address these concerns, there has to be a tracking system established not only for informal grievances, but a tracking system has to be established for meritorious grievances submitted through the system. I suggest the new appeal form be further modified so that it contains a random six digit tracking number similar to the CDC Form 7362. This approach would create a receipted record of a grievance mailed. **[AG2]**

The new form continues an existing flaw: its ability to become lost. Repair is simple, keep the format and just add self-duplicating triplicate process, the very same proves that works well with the medical forms. **[BM-#1]**

The idea of a Form 22 receipt is ingenious and I wish they'd do it for 602s as well. **[JDR-#6]**

Over the years many 602's vanish. **[M-#4]**

I suggest: Officers picking up mail sign the Form 602 and provide the receipt as the form is placed into the mail bag to be processed. Such handling would be consistent with processing outgoing legal mail and at least prove that the form submission was attempted. **[JDR-#7]**

RESPONSE: Among the difficulties associated with and justifying discontinuance of the Informal appeal step was lack of accountability (see ISOR pages 2 and 3). At no place does the ISOR imply, however, that the Department never lost or refused to respond to appeals or that the only controversies in court arose with regard to appeals were those at the informal level. Commenter assertions to the contrary are clearly misleading and misrepresents actual ISOR content. There had been considerable internal discussion about the problem of appeal tracking leading up to the actual promulgation of these rules.

- One rejected option was the transformation of the 602 Form series into NCR, much as is the new Form 22 (see commenter suggestion above). Already plagued with numerous "readability" issues, this option was rejected because of the difficulties inherent in deciphering

SUMMARIES AND RESPONSES TO ORAL AND WRITTEN COMMENTS

the bottom-most copy of forms in this format. Also, with multiple page forms, the NCR option would have been at best cumbersome or unwieldy and, at worse, an unworkable paperwork nightmare.

- Likewise, imprinted serial numbers would constitute a major departure from existing practice, necessitating so many adjustments in prevailing tracking and processing practice that this option isn't feasible, given contemporary fiscal constraints (see discussion, beginning on page 2). In other words, this is not a more effective or as effective and less burdensome alternative.
- While the suggestion for officer involvement in the 602 process at the mail pick-up stage is not practical because it would also entail widespread adjustments in contemporary practice, it will be taken under advisement for future consideration.

Notwithstanding the above, an option does exist for the "tracking" of appeal submissions, as follows:

- When an appeal is submitted and assigned a log number, a notice that it has been received is automatically generated by IATS. If this notice is not received within a few days the appellant may write the Appeals Office using a Form 22, NCR receipted, inquiring as to the status of the appeal.
- Alternatively, if an appellant feels they have reason to believe an appeal might be destroyed or misplaced, they can attach a Form 22 to the appeal, get a receipt of having submitted the appeal on a date certain and receive a response notifying them of the receipt of the appeal. In the event the appeal is lost the Form 22 receipt will act to establish when the appeal was submitted for purposes of meeting time constraints. This variant corrects commenter failure to understand that the Form 22 does not replace the informal step, and that it is an entirely new process of receipt and documentation which when used in tandem with another form such as the 602, make that form a receipted form as well.

3084(c) Material Adverse Effect

At the center of these proposed changes is the new prerequisite term "material adverse effect" [which will be...] the primary tool of denial. **[SD & KB-#4]** A law dictionary defines "material" as meaning "important or relevant." These are highly subjective terms. The Department has not clarified "important to who?" and "relevant to what?" What's important and relevant to inmates and important and relevant to staff are disparate and incongruous. The definition provided only adds to the vagueness of the term. Measurable and demonstrable are definitions more constructive of the tangible definition of the word material; completely eliminating the spiritual or emotional aspects to inmates as humans. Does this term construction disallow appeals based on harm to the emotional well being of an inmate? You must clarify this vague regulation. Not to do so would leave to the individual coordinators arbitrary discretion to define what's important and what's relevant on a case by case basis, and lead to inevitable abuse. **[SD & KB-#5]**

Coordinators may read the appeal and decide it is meritless and then cancel it as lacking a "material adverse affect." Is a violation of a constitutional right a material adverse effect? Is it measurable and demonstrable? What about a statutory right, regulatory provision or institutional privilege? The Department seeks to empower hundreds [of staff] with the capacity to unilaterally decide an appeal on its merit without due process. That it [deliberately] intends to unilaterally decide and cancel out appeals is made plain in the ISOR paragraph (pg. 2) which states that the objective is to reduce complaints without merit. This statement clearly indicates that they intend for the screener to unilaterally evaluate appeals on their merit and cancel those they feel are meritless. In any system of judgment or review, fairness and due process require that a fact finder decide merit, not the paperwork processor. This would be akin to the court clerk finding "probable cause" and then forwarding a case to trial or canceling the complaint. **[SD & KB-#7]**

This new requirement is extremely subjective and no examples of what type of appeals deemed "frivolous and nonsubstantive" have been outlined nor mentioned in the ISOR as the basis to support this more restrictive language. This requirement will outright prevent even the filing of any complaint which, without any formal investigation, appeal coordinators can deem nonsubstantive and reject. A "nonsubstantive complaint" determination cannot be made unless the inmate is first allowed an opportunity to submit his complaint and it be investigated. If an appeal or staff complaint is deemed frivolous or nonsubstantive, it should be a court that makes

SUMMARIES AND RESPONSES TO ORAL AND WRITTEN COMMENTS

the ultimate determination. I suggest the previous phrase “adverse effect” be retained or that examples of what CDCR considers frivolous and nonsubstantive complaints be outlined in order that inmates may know what type of appeals and complaints they should not file in the first instance. **[AG1-#1]**

This language will further intimidate inmates from filing because “material” is a matter of judgment. What may be a serious and material effect from the inmate’s perspective could be determined to be immaterial and land the inmate in trouble for filing a “frivolous” 602. Make the standard clearer and don’t make it so high that inmates are further discouraged from filing valid 602s. **[JLT-#13, JLT-#14]**

This language seems vague, capable of being too easily misused by employees and is otherwise defective. Because such language fails to establish, identify or otherwise acknowledge any specific standard of criterion by which an injury or harm can be either measured or demonstrated at the outset of initiating a grievance or appeal, the reasonably likely result is arbitrary, capriciously and otherwise wrongly rejected grievances merely to avoid having to address and resolve certain types of difficult issues and/or to hinder such issues from becoming administratively exhausted or judicially reviewed. **[ECRK-#7]**

The language “material adverse effect means a harm or injury that is measurable or demonstrable” seems to conflict with proposed 3084.9(a)(1) respecting emergency appeals for the legal definition of an “irreparable” injury or harm is one “that cannot be adequately measured.” **[ECRK-#8]**

This section must be revised to delete the definition of “harm or injury that is measurable or demonstrable” because these terms are vague and appear to exclude—and thus bar from the administrative appeal process—grievances concerning deprivations of or restrictions on important constitutional rights such as freedom of religion or due process. CDCR should not include a definition central to administrative appeals that serves to prohibit prisoners from presenting these types of grievances in which tangible proof of harm is not available. The regulation must make clear that such grievances are permitted, just as they are by the courts per cited decision. **[SF-#1]**

An inmate subject of staff verbal abuse could arguably be unable to demonstrate material adverse effect on his or her welfare. Yet the Department would be will served by a grievance system that allowed an inmate to bring this type of conduct to the attention of the officer’s superiors. As well as being unnecessary, it is but another means that the Department seeks to insert in order to play “gotcha” with inmates later in the litigation process. **[CCW-#9]**

When the everyday tension between staff and inmates results in disrespect and petit abuse of authority (i.e., denying a shower or refusing to let someone out for a phone call or to yard), the inmate usually files an appeal against that staff member. These appeals are numerous and form one of the primary motivation for inclusion of the “material” prerequisite to filing. Appeals staff label these type of complaints as “hurt feelings” appeals. It is these to which the ISOR on page 2 refers to yielding nothing of value either to the appellant or the organization. Seeking to eliminate this area of redress ignores the anger management aspect of such redress avenues. In anger management a venting process is fundamental to relieving pressure in an aggrieved individual’s mind. Prisoners have a demonstrated propensity to express their anger and frustrations with violence. So when staff cause “hurt feelings” it is going to be either vent or let the pressure build. Imagine the social chaos that would ensue if people were not allowed to redress such issues. Enhance that with the poor judgment and propensity to violence of level 4 prisoners and you can see the devil the Department has chosen in the name of reducing workload. If venting is not allowed through the appeals process, they will seek relief in familiar [antisocial] manners. [Consequently], elimination of non-criminal misconduct complaints is a misguided provocation. Employee convenience is not a worthwhile exchange. **[SD & KB-#13]**

3084.1(a) Material Adverse Effect

The requirement that a prisoner must demonstrate a material adverse effect is vague and in many cases impossible in the limited form space provided and this would work to deny one’s ability to exhaust administrative remedies. **[BKB-#3]**

Language is defective because it is likely to result in staff arbitrarily and otherwise wrongly rejecting grievances merely to avoid having to address and resolve certain types of difficult issues and/or to hinder such issues from becoming administratively exhausted or judicially reviewed. **[ECRK-#13]**

SUMMARIES AND RESPONSES TO ORAL AND WRITTEN COMMENTS

The “health, safety or welfare” clause seems capable of being too easily misused by appeals staff as grounds for rejecting meritorious appeals concerning an offender’s status, program, privileges, etc. which cannot be said to clearly fall under any such heading. [ECRK-#15]

Text of this section conflicts with the Department Operations Manual [ECRK-#16]

This change effectively put an end to grievance appeals against simple unfair treatment and unprofessional behavior by prison staff (primarily guards). Example provided of alleged cursing of inmate by guard. Under prior regulations, the guard’s action would have been appealable and thus such behavior could have been “in check” for a few weeks. [JLM-#6] Such abusiveness can’t be appealed under the new rule because there was no demonstrable “material” adverse effect. [JLM-#7, JLM-#12]

Should be modified to indicate that only some/selected issues may be appealed, due to the filing restrictions imposed by 3084.1(f) and 3084.8(b). In point of fact, if an inmate suffers significant adverse actions daily for 12 consecutive days, he is only allowed to appeal 3 of those due to the cited provisions. [LB-#1]

RESPONSE: Once again the objections raised would seem credible in the absence of additional descriptive language in the Department Operations Manual, or access to training material regarding the terms in question, as this document elsewhere explains.

- The use of words like “material” or “demonstrate” is only intended to eliminate those appeals which are so vague and subjective, that there is no basis for a response, and consequently little hope of remedy or relief. The writers would no doubt concede that an allegation of emotional harm or distress absent some causative factor does not lend itself to resolution.
- What makes such a claim “material” and “demonstrable” is a description of facts or circumstances related to staff conduct or decisions which have led to the emotional response. So an appeal alleging that “staff dislike me” would be returned for clarification, for failing to state a material adverse effect. What was said or done, and how did that affect me? For example, if the appeal is resubmitted with the additional statement that staff don’t like me “and I know this because they tear up my cell every day when they search,” then that language would be deemed to meet the standard of material and demonstrable.
- Likewise it has been commented that this language excludes the more abstract notion of harm embodied in constitutional violations or procedural deprivations. Nothing could be further from the truth. It is true that appeals stating (as many do) “you are constantly violating my eighth amendment rights” is subject to screening and a request for additional information. The same appeal, if it included a description of alleged abusive behaviors on the part of staff, would be deemed material.
- Further, the word demonstrable does not mean “demonstrated”. It merely means that what is alleged can reasonably be expected to be demonstrated at some point in the appeal process. For instance we commonly receive appeals stating that a particular staff member has psychological problems. The appeal process cannot ever demonstrate this assertion, absent additional information. However, a statement of behaviors that might suggest that a staff member has psychological problems can be filed and could, through the staff complaint process, lead to a psychological evaluation of the employee in question. Under the new regulations vague assertions will no longer be accepted, or processed and then denied absent some statement of facts than can be addressed by the response since this is a waste of valuable resources and provides no credible benefit to the appellant.

Accordingly, all commenter requests for textual change are declined on the basis of being no more effective or as effective and less burdensome.

3084(g) Staff Misconduct

With respect to the clause “violates or is contrary to law” staff need to understand that case law is the final interpretation of law, wording, construction and application. Title 15 and the Departmental Operations Manual (DOM) **do not** supersede statutory/constitutional/case law doctrines, rights and protections. [H-#6, EVW-#5]

SUMMARIES AND RESPONSES TO ORAL AND WRITTEN COMMENTS

RESPONSE: Applicable and relevant only to the specifics of the case argued, while case law can be the final interpretation of what is “legal,” the scope of that decision is narrowed significantly by the jurisdiction of the court in question, the facts at issue, and a number of other factors including timeliness and circumstance. Accordingly, from a practical standpoint staff is more soundly guided by the regulations encompassed in Title 15 and instruction provided by the DOM than any citation of case law can provide. While “constitutional rights upheld by case law” are a frequent basis for Departmental staff misconduct claims, the validity of such assertions are so dependant on case particularities as to render such allegations nearly meaningless in blanket or general terms. See also previous discussion, pages 3 through 6.

3084.1 Intention and Purpose of the Appeal Process

Do not omit the word “meaningful” from before the word “remedy” [EKRK-#10]

Text signifying that “...the appeals process is intended to provide an administrative mechanism for review of...[matters]...that have a detrimental effect,” seems to conflict not only with the “reasonable likelihood of harm or injury” text of 3084(c) and also with the “which may adversely affect” language that currently appears in the Department Operations Manual. [EKRK-#12]

RESPONSE: The phrases “meaningful remedy” and “may adversely affect” both appear in the non-regulatory context of existing DOM text. Removal of the former from the DOM is not anticipated while the latter will be deleted, in the interest of conformity. Commenter assertion of conflict between 3084(c) and 3084.1 is not readily apparent. The reasonable likelihood of departmental policies, decisions, actions, conditions or omissions may be reviewed via administrative mechanisms set forth in the article now under consideration.

3084.1(b) Administrative Remedy Exhaustion

This rule is objectionable because it arbitrarily states that cancellation or rejection does not exhaust administrative remedies. However, if the cancellation or rejection precludes further appeals of the same subject, or precludes re-submission or the appeal, it must by definition exhaust administrative remedies. [DAM-#1]

The rule is misleading because a court can and very well might allow a prisoner to file a habeas petition without first filing an administrative appeal if the action requested cannot be granted via such an appeal, it is clear the appeal would not be granted (futile), or there is some emergency such that failure of the court to act immediately could cause great harm to the prisoner. [DF-#3]

The provision specifying that “administrative remedies shall not be considered exhausted relative to any new issue, information or person later named by the appellant not included in the original appeal” places a heightened pleading requirement on inmates who sometimes do not know who is responsible for the adverse action which initiated the appeal, nor do they know all the facts surrounding the aggrieving issue. To some extent only after levels of review and personal interviews are appeal issues clarified. It is extremely unfair to demand that inmates have detailed information and know the names of all officials involved when first submitting an appeal. The rule will prevent an appeal from being filed at the next level based on new information gleaned from the previous level. Cited case law and the Prison Litigation Reform Act (PLRA) does not impose a “name all defendants” requirement during the administrative appeal process. As long as notice of the problem is provided, there is no need to require prisoners to present fully developed legal and factual claims at the administrative level. Based on this interpretation I suggest the third sentence of 3084.1(b) and 3084.6(b)(16) [pertaining to rejection based on a change in appeal content to the extent that the issue is entirely new and required lower levels of review have been thereby circumvented] be redacted. [AG1-#2]

Contrary to the decisional (case law) of the state and federal courts, appeal coordinators (always a former guard or sergeant of the guards) can reject an appeal (i.e., refuse to accept it) and cancel a previously accepted appeal, thereby preventing a 3rd level of review, but then claim that the inmate has not exhausted administrative remedies. [JLM-#11]

The matter of “new issues” is unclear. What happens when an appellant alleges staff misconduct DURING the previous level of review, which compromised his rights (e.g. no interview was held;

SUMMARIES AND RESPONSES TO ORAL AND WRITTEN COMMENTS

response does not address the issues, etc.)? Must he file a new/separate appeal, or raise those 'new issues' at the next level (Staff have objected to both procedures)? **[LB-#2]**

RESPONSE: We agree that the issue of exhausting administrative remedy is a matter of the PLRA and prevailing case law. The intent of the language as adopted was to keep appellants from filing vague appeals that could later morph into litigation over matters or things that the Department never had the opportunity to address. Doing so is directly contrary to the PLRA. (See also page 24 discussion).

- It should also be noted that the new regulations create a duty for staff to assist in identifying parties to an event where the inmate lacks the ability to do so themselves. Likewise, nothing precludes an appellant from arguing in court that referencing John and Jan Does is a necessity because (despite their best efforts), they could not identify them previously. However, when they pointedly refrain from making such an identification at the time of the appeal and do not seek assistance from staff in doing so, their claims may look disingenuous.
- Contrary to what has been suggested the new regulations are designed to ensure greater transparency up front as a way of eliminating confusion and abuse at the back end. Specifically, the process has further changed the previous language on screening out forms. Disallowing the appeal of a screen out decision has been eliminated. Now any cancellation decision is itself subject to appeal and the exhaustion of administrative remedies on that decision has been made possible.
- Finally the reason that an issue raised in an appeal designated a staff complaint must be addressed separately is because that, by definition, a staff complaint response is confidential. So for the appellant to get a response to other issues, they must be a part of another appeal.

3084.1(c) Equal Access and Assistance

The facial presentation of this provision is a paper tiger. The Department lacks the resources and personnel to fulfill this provision. The Department knows this fact and provides a way out with the qualifying ISOR prescription "insofar as prevailing organizational resources permit." Prevailing resources do not permit even the pretense of assistance for inmates with difficulties communicating. Those with literacy issues and physical deformities will not be served. **[SD & KB-#9]**

RESPONSE: The phrase cited (ISOR page 5), is intended only as qualifier with respect to the word timely, not (as the commenter asserts) a way out of providing equal access and assistance to those needing assistance to participate in the appeals process. Notwithstanding the fact that prevailing resources are challenged, every effort to assist those with literacy and physical limitations will continue as it has in the past, with greater attention thanks to the textual emphasis added with this rule adoption.

3084.1(d) Disciplinary Sanctions

The proposed regulation permitting disciplinary sanctions will have a severe chilling effect upon an already reluctant portion of the inmate population even filing appeals that have merit, especially considering the inmate population's average educational level, which bars them from being able to fully appreciate the regulatory language surrounding the topic of "Appeal System Abuse." **[DSM-#4]**

This will not deter the small number of inmates currently abusing the appeal process by filing excessive and frivolous 602s, but will cast a further chill over the majority who has valid issues. **[JLT-#15]**

Text of this section implies that offenders shall be subjected to appeal restriction and discipline for even unintended appeal abuse or rule violations in violation of the federally guaranteed right all persons have to not suffer retaliation for freely expressing themselves in petitioning government for a redress of grievances. **[ECRK-#17]**

RESPONSE: The disciplinary "sanction" of appeal restriction is **not** new. Additional subsections (see ISOR pages 8 and 9) provide clarification and direction necessitated by the APA-specific

SUMMARIES AND RESPONSES TO ORAL AND WRITTEN COMMENTS

regulatory nature of the Secretary's rules. There are no disciplinary sanctions for abusing the appeal process, although one may be placed upon restriction for doing so. Inmates are simply being advised that the appeal process is not a shield for violating Department rules and they will be held accountable if they do so. Such elaboration in language is largely unavoidable in order to achieve the objectives of the regulatory revision in question. In any case, any alleged "chilling effect" is wholly collateral and does not purposely target the educational level of potential appellants or add significantly to any existing difficulty they may have in "appreciating" the rule in question. Disciplinary rules separately explain and are enforced in many other areas of prison life. Furthermore, rule violations have always been subject to disciplinary sanctions and reiteration of this is simply intended to provide added emphasis to an existing reality. Inference of other, darker motives such as punishment for unintended appeal or rule violations appear to reflect the mind-set of the commenter in question and clearly pose no alternative for consideration. (See also discussion "Reprisals" above).

3084.1(f) Appeal Frequency

This change is totally unnecessary. Restrictions on the quantity of submissions should be based on quality, not quantity. This is another gross attempt of deprive people of their right to seek grievance redress. **[WR-#6]**

Delete the limit of one appeal per inmate every 14 calendar days. Although officials may find it inconvenient to respond to more than one non-emergency appeal from an inmate in any 14 day period, additional appeals should be permitted so long as the inmate alleges and show a materially adverse effect even if it is not an emergency. Additionally, given the 30-day time period [of occurrence] within which a grievance must be filed, the limitation on the number of appeals that can be filed within a 14-day period may result in a prisoner forfeiting his right to appeal solely because prison officials repeatedly fail to follow their own rules, or other legal requirements, in their treatment of that prisoner. **[SF-#2]**

Due to the low caliber of Departmental employees, episodes which warrant submission occur practically on a daily basis. **[WR-#7, DF-#9]** As long as an appeal addresses a legitimate, non-frivolous, non-vexatious matter, it should be permitted. **[WR-#8]**

Do you really believe the Department is running 50% better, or guarantee 50% less problems? So limiting 602s to one every weeks is ridiculous. What we need is no limit. If there is a problem, write them up, period. **[JPF-#2]**

I [and 400 other inmates] oppose this change which eliminates and clearly denies all inmates statewide from two 602 appeals a week to one every fourteen days. It should not be adopted. Inmates are thusly prevented from filing valid appeals and all inmates are being denied access to courts, with serious adverse affect. The change also denies and precludes inmates to legitimate access to [the] administrative remedies [essential] in order to comply with state and federal court requirements. **[GDH-#1, GDH-#4]**

The current filing of two appeals a week has not and will never be overwhelming or bog down the appeal system. The current filing limit has not been or led to an unprecedented number of appeals being filed. There are inmates in every prison statewide and given [the] high number confined, [this alone] would not lead to an unprecedented number of filed appeals. Two legitimate appeals per week is an appropriate limitation requirement. **[GDH-#2]**

I dispute the claim that the system is overwhelmed. If grievances were properly decided on the basis of merit of act and not just rubber stamped "denied" when first received, there would be reduction in the number of second and third level appeals. **[C3-#3, BB-#2]**

If a prisoner is abusing the process, they can be suspended from filing. Therefore, any valid complaint of grievance should be allowed, no matter what the timeframe, to ensure the prisoner's right to due process. Therefore, the 14 day limitation is unnecessary and serves no purpose. **[C3-#5].**

Diminishing and precluding inmates [in this manner will] only lead to an unprecedented number of lawsuits [claiming] denial of access to the courts and the administrative remedies requiring exhaustion [for court access]. Court action will in fact be sought in this regard. **[GDH-#3]**

This rule is objectionable because it imposes a one every 14 day restriction without any justification for such a restriction. Accordingly, it is completely arbitrary. An inmate may experience an act or disadvantage which requires an appeal and then only a few days later need

SUMMARIES AND RESPONSES TO ORAL AND WRITTEN COMMENTS

to appeal from a completely different action. Because of the deadlines imposed, the inmate may be arbitrarily deprived of submitting a timely appeal of a subsequent matter. You have proposed other regulations which discourage and prohibit arbitrary and excessive numbers of appeals, which accomplish the same purpose as this rule. **[DAM-#2]**

These provisions are designed to restrict inmates' legitimate access to administrative remedies and silence inmates even when their appeals have credible issues, considering the fact that CDCR is proposing regulation changes that allows "disciplinary sanctions" against inmates for misuse or abuse of the process and to screen out appeals with frivolous issues. **[MIC-#2]**

This provision arbitrarily and egregiously limits an inmate's/parolee's access to the courts by imposing onerous restrictions on the number of appeals that can be submitted. In most prison environments, there is not a day that passes when there is not at least one violation of a prisoner's constitutional rights. The old regulatory limitation of one appeal every seven days was already perniciously restrictive and, not that the limits have been extended for an additional seven days (for 14 days total), the new amendment is exacerbating the problem by "severely" obstructing access to the courts [preventing administrative remedy exhaustion] **[JA-#2, MAW-#2]** Your agency cannot restrict access to the courts or limit ability to petition government for redress of grievances. This limit chills First Amendment right and violates Fourteenth Amendment right of access to courts by depriving inmates the ability to exhaust administrative remedies before court processes. Accordingly, the AC screen-out authority set forth in 3084.6(b)(3) should be invalidated. **[H-#9, EVW-#8]**

This rule reduces by about half the number of appeals a prisoner could submit under the old regulations. **[KDS-#4]** This regulation would limit even further a prisoner's ability to seek redress for errors and misconduct by prison officials. It is contraindicated to fully letting prisoners have issues and misconduct redressed, and is totally unnecessary. **[DF-#9]**

Such limitation seems overly restrictive and capable of preventing appellants from seeking and obtaining prompt and satisfactory resolution at the lowest possible level concerning events and circumstances they perceive as adversely affecting them. As a potential result, offenders will possibly become more likely to resort to other, perhaps even violent, measures in order to vent their grievances and get their opposition heard regarding whatever injustice, oppression, neglect, etc. they might have experienced shortly after initiating an earlier appeal with the previous 14 days. It seems one appeal every 10 calendar days, rather than 14 would be much more reasonable and agreeable. **[ECRK-#19]**

With respect to use of the word "file," clarify that to "file" an appeal only pertains to the initiation of an appeal rather than the submission of an appeal for higher-level review or the returning of a previously initiated appeal to appeals staff after it was rejected for some reason that has been either corrected or is being challenged in writing as being clearly erroneous or contrary to law. **[ECRK-#20]**

The new appeals process greatly limits a prisoner's ability to address and contest conditions of confinement by only allowing one 602 to be filed every fourteen days and the new regulations are designed to delay responses. **[EDC-#3]**

Specify that the time constraints in the subsection apply to only appeals submitted for the First Level of Review. Otherwise there is incongruity, where there is no specificity the appeals that have already received responses at lower levels do not fall under the subsection. On many occasions, coordinators erroneously consider appeals resubmitted for further review (after the appeal has already been processed, issue a log number, and provided a response) as being an appeal that triggers/activates the 14 day limit. For instance, if I resubmit an appeal today for further review after first level denial, coordinators will routinely refuse to process any more appeals submitted by me until after another 14 days expire. **[JA-#3, MAW-#3]**

Rule fails to address how an appeal that was rejected or cancelled is treated (i.e., do either count toward the allowed 1 per every 14 days?) **[LB-#3]**

A granted appeal should NOT count toward the limit and that effectively punishes the inmate for staff's actions. **[LB-#4]**

The ISOR states that the frequency change was derived by an average number filed. I interpret that to mean the total number of inmates in the entire system divided by the total appeals filed that reach the 3rd level. There are several problems with this algorithm:

SUMMARIES AND RESPONSES TO ORAL AND WRITTEN COMMENTS

- There is a huge number that do not file; broken into the following classes: Immigrants, I and II Level Inmates, Inmates soon to be released, Inmates with a GPA of less than 9.0, [Compliance with unwritten...] mainline rules that [dictate...] obtaining permission from Inmate "Shot Callers" of their race/group.
- A census taken into the validity of this observation would likely reveal the changes in this regulation to be aimed at a specific group of inmates—just like integrated housing changes.
- The majority of appeals filed do not make it to the 3rd level; mostly due to inmates becoming frustrated trying to maneuver around coordinators.
- Utilizing a figure from the end of the procedure to set a limit that only affects the initial filing is erroneous.

Setting a limit of any kind interferes with constitutional freedoms to address grievances, but at the very least needs to go back to one every 7 days.

[JDR-#5, LB-#5]

RESPONSE: Incorrect assertions of denial to court access, supposed unjust imposition of penalties upon those submitting appeals and erroneous assumptions about offender constitutional rights have already been discussed above in this document. The assertion that the one every 14 day limit was made without justification and is therefore "completely arbitrary" is baseless and ignores just such justification provided on ISOR page 6. Expressly, the change is explained as an attempt to better manage the appeal workload for the good of everyone in a way that does not negatively impact access for the vast majority of participants. The oft-stated demand to be permitted unlimited appeal filings is responded to under the 3084.2(a)(1) heading below. Beyond this, there are actually three broad areas expressed by commenters that must be addressed separately. The first is the number of appeals allowed to be filed within a certain time frame, the next is what kinds of appeals count toward that allowable number including rejected or cancelled appeals and the third is whether appeals being advanced to a higher level of review count toward the limit of appeals that can be submitted during that period.

- Firstly, assertions that the number of appeals that can be filed has been cut in half are based upon a thorough misunderstanding of the changes being implemented. Previously inmates could file one appeal every seven calendar days, with the exception of emergency appeals, which were very narrowly defined.
- Under the new rules they now can file one non medical appeal and/or one medical appeal every 14 calendar days which, depending on the kind of appeal filed, is the same number that was permitted before. Then the definition of an "emergency" was broadened to allow any appeal, without restriction in number, where there is a significant threat of harm. On top of all this, coordinators have been given discretion to accept significant issues where a strict application of screening standards could result in denial of access to remedy on such an issue AKA the "exceptional circumstance" clause (see discussion pages 5-6).

As mentioned immediately above (and in the ISOR), the specific numerical restriction of one every 14 days was put in place after it was determined that a very small number of inmates generate a totally disproportionate number of appeals clogging the system and overwhelming its limited resources.

- This degrades the quality of the process for others. Consequently limitations have to be placed on the mass filing of non essential, non medical appeals. But for essential appeals and especially those where there is a showing of significant harm or potential harm, the special exclusions delineated have been crafted operationally to keep these from being cancelled.
- Finally, appeals advancing to a higher level of review do not count toward the number allowed. Only new submissions do. Furthermore, an appeal that is submitted but rejected still counts toward the allowable number because it is an appeal in process. However, a cancelled appeal does not.

The suggestion to change one every 14-days to one every 10-days is declined. No only is there too little difference between the two time frames to matter, the 14 day number is a straightforward doubling of the previous time fame and a familiar benchmark.

SUMMARIES AND RESPONSES TO ORAL AND WRITTEN COMMENTS

3084.1(g): Adherence to Time Constraints

28 CFR 35.17 is cited as authority even though the US Attorney General seems to have promulgated all of part 35 in 28 CFR with respect to the Americans with Disabilities Act rather than anything having to do with the Civil Rights of Institutionalized Persons Act. [ECRK-#3]

RESPONSE: The APA requires each adopted rule to identify the rulemaking authority for adoption and to reference provisions of law implemented, interpreted or made specific by each regulation. Accordingly, the Federal regulation cited appears in the reference (as opposed to authority) portion of 3084.1 (as well as 3084.2). While the federal rule has applicability only for the Rehabilitation Act of 1973, it specifies that state agencies employing more than 50 individuals shall adopt and publish grievance procedures providing for prompt and equitable resolution of complaints alleging actions prohibited by that law. Having long-standing status as the basis for elements of the appeals article, the Department has decided retention is harmless and for good measure repeats it in two different subsections, in support of the provisions found in 3084.1, 3084.2(c) and 3084.2(d). Citation of this particular CFR is separate and aside from the application of any other such regulation and is entirely divorced from application of any other section of this or any other title of Federal Regulations. (See page 19 refuting the claim that Title 40 of the CFR is governing).

3084.2 Add a New Photocopy Entitlement

Include language entitling inmates to initially obtain a single photocopy of their appeal and appeal attachments for their own personal records, as well as to thereafter obtain a single copy of their appeal and most recent appeal response prior to submitting their appeals for review at the next level. Such provision seems absolutely essential because staff routinely refuse to photocopy inmate appeals and related documents, which frequently results in appellants being left without a backup copy of their grievances for presentation to the courts or for other purposes after staff "lose" or unreasonable delay responding to originals. In accordance with articulated legal principles and judicial practice as cited, the Department as a whole must comply with a Fresno County Superior Court decision to allow inmates photocopies of their administrative appeals at all levels. [ECRK-#22]

The requirement to provide supporting documentation has always been a problem since it is very difficult to obtain copies—especially if an inmate is indigent—and that alone is grounds to screen out an appeal. Supporting documents as defined in these rules are not authorized documents allowed to be copied for indigent inmates. Section 3162(d)(10) comes close, but a written explanation has never worked for me. [Accordingly...] there should be an addition to the Legal Forms and Duplicating Services rules that would allow for copies of documents that meet the criteria of 3084, inclusive. [JDR-#9]

RESPONSE: The desire for expanded photocopy privileges has been previously expressed in denied petitions submitted by incarcerated offenders. While is cognizant of its obligation to see that inmates' access to the courts is not impeded, the Department predicts that compliance with this particular request would result in unnecessary duplication and waste. Each time an appeal is acted upon (responded to), at any level, the inmate appellant is returned the entire appeal and supporting documentation. Therefore, at the conclusion of the appeal process, the inmate has those documents to attach to a subsequent complaint filed with a court. Department staff routinely makes the number of copies that are required by the courts for inmates to maintain their lawsuits. Although appeals paperwork is sometimes lost by staff and by the inmates/parolees themselves, Appeals Coordinators at each institution maintain copies of the appeals for their files and are able to reconstruct lost or misplaced appeals. Should the appeal paperwork be lost, the inmate appellant may proceed with his/her appeal issue to the next level with a duplicate copy of the appeal marked "treat as original". It is the Department's perception that, rather than to facilitate the inmate appeals process, blanket imposition of a photocopy entitlement would thwart the existing process and overburden the copying process for those inmates in need of such services for court filings. Moreover, nothing precludes inmates from obtaining copies or making handwritten copies of their appeals. Furthermore, since indigent inmates don't have access to

SUMMARIES AND RESPONSES TO ORAL AND WRITTEN COMMENTS

photocopier copies of their appeals or attachments, they can attach a CDCR Form 22 to the appeal to receipt the fact that it was submitted and to document what was attached.

3084.2(a) Issue Limitations

Incidents occur that raise multiple issues a lot of times, what provision provides for such matters to be appealed? The Department is not limited in multiplying the allegations they seek to file on a prisoner in the court from the same set of operative facts. **[BKB-#7]**

RESPONSE: Note that the exclusion is more than one issue unrelated to other issues and for which there is no nexus. In fact, a single situation can be appealed on a single appeal even though there may be multiple issues raised within the context of that situation.

3084.2(a)(1) Limit of One or One Related Issue per Form Submitted

The inability to combine issues, in light of the limitations of 3084.1(f) [i.e., 1 appeal every 14 days] creates a restriction by making inmates sacrifice their rights by permitting remedies to only limited wrongs that can be identified during a specific period. This policy forces inmates to choose which right/privilege they want remedied instead of making CDCR fix all identifiable "adverse effects." Appellants should be able to exhaust remedies to each separate tortuous action by the agency so one would not be procedurally barred under the Government Code's torts claims act. Within 30 days I posit four issues of which only two can be filed, CDCR has thereby created an inmate procedural default, barring judicial litigation, denying ability to exhaust remedies in violation of 42 USC 1987(a). **[H-#10, H-#11, H-#12], EVW-#9]**

Due to the erroneous conclusion of fact/law demonstrated in the enactment of NCR 11-02 I have been denied a right to be heard in court. For every 602 I'm denied filing, I'm going to sue for tort damages of \$25,000. **[H-#14, EVW-#11]**

RESPONSE: The dilemma of choosing which "wrongs" to remedy is a fact of daily life for everyone. Petty slights, bruised egos and imaginary injuries (including "infringement" of rights) exist in the world outside prison alongside serious harm, material loss and events grounded in fact. These matters are sorted out on an everyday, ongoing basis and acted upon (if at all) depending on the degree of seriousness and possible remedy. Should there be a different reality for individuals in custody, as these particular commenters appear to advocate?

- Any offender appeals system devoted to rectifying "all" the grievances of the incarcerated, as requested above, risks breaking down or suffering paralysis, as the number, frequency or types of correctives desired has no end.
- Furthermore, while playing no role in determining the status of incarceration, the Department looms large in the minds of those delivered into its custody. Any impulse to seek retribution for "unjust" treatment (or "wrongs") takes on special meaning in a prison context (for an example, see commenter **JDR-#4** on page 18). As the "personal harm or wrongs" an individual can encounter includes incarceration, the desire to make someone pay a price for it's imposition can be only considered a natural (albeit highly misplaced) human resentment. Irrefutably on the other hand, the Department and staff can't avoid being targets of resentment, especially the free-floating kind. Any available grievance system thereby becomes the means of raining blows, great, puny or (as can be the case too frequently) nonsensical upon the proximal targets of resentment, as opposed to those beyond reach and who may have been actually responsible for imposing the (self defined) "wrong" of incarceration.

Consequently, Departmental acceptance of responsibility for remediating all "identifiable adverse effects" (AKA wrongs) in the manner requested, irrespective of time frame, problem severity or factual basis, would afford the incarcerated an extraordinary privilege unavailable in the real world. That privilege would be the means, in an officially administrated manner, by which to try to make whole at any time, all and any harms that are real, inconsequential or imagined. As this response repeatedly observes, absent reasonable limits and conditions, there would be little time to do anything else. The real world imposes limits upon those outside prison and for prisoners to

SUMMARIES AND RESPONSES TO ORAL AND WRITTEN COMMENTS

ask for the opposite and actually expect the Department to comply borders on the irrational, especially from the standpoint of general public perspective.

- Of course, offenders are always free to seek judicial remedies and that outcome is expressly threatened if the “remedy all wrongs” demand is declined and the commenter “experiences” the self-perceived “harm” of court access denial.
- So, besides denigrating the public comment process and affording no meaningful option for response, this particular commenter provides us a case in point example of the problem set forth above: Make my perceived harm whole (says the offender), or you’ll be sorry, I’ll go to court, making you pay money to compensate (entirely imagined) torts.

Notwithstanding any of the foregoing, furthermore, the fact remains that the system now allows for three individual appealable events within a 30 day period excluding medical events which are appealed separately. It then makes exceptions for emergency appeals and finally allows the coordinator discretion to waive the rules in case of necessity to avoid significant harm. On any rational basis, of course, this hardly seems an unfair limitation. Whether such facts can dampen the kinds of unrestrained expectations posed by commenters such as those above is highly problematic, however.

3084.2(a)(2) Space Provided Limitation and Legibility of Content

(a)(2) Arbitrarily limits an appellant’s ability to sufficiently and thoroughly address grievances. [Being...] limited to an extremely confined space to explain complaints appears to be by design, because anyone who is even slightly familiar with the appeal process will confirm that a thorough explication, in most cases, is essential for coherence and preservation of the issues for future litigation purposes. Without an adequate amount of space, inmates/parolees are forced to condense the description of their problems, which typically results in the abandonment of crucial facts that need to be presented. **[JA-#1, MAW-#1]**

The space provided is dramatically reduced; while at the same time the burden on the appellant to demonstrate an adverse effect has been increased to a material adverse effect. Just demonstrating the material adverse effect could take up the extremely small space provided in the new forms. In addition, staff are not limited in space; and the more voluminous a staff member’s response, the more voluminous the appellant’s reply must be in order to cover the points and authority proffered by staff. **[RT-#1]**

Mandated forms restrict the space available to properly address their grievance, and [constitutes] an adverse action to the pursuit of due process through the courts. There is not enough space to address the grievance, list involve parties and provide appropriate citations; especially if the action were to advance to a lawsuit or court action. One filed, the complaint cannot be “added” to or amended; everything must be stated in the original complaint. This restricted and reduced space eliminates the room for prisoners to list all necessary information, the amount of space available [in this regard being]...imperative. **[C3-#5]**

Review of the forms demonstrate that the spaces provided to explain the issue is so small that there are very few issues that could be adequately presented. Anecdotally, I have been submitting appeals since 1976 and I have rarely ever been able to provide all the information required and state all the relevant facts in such a small space. **[DF-#5]**

This section should be changed to read “by the appellant/appeals coordinator.” Almost 9 time out of 10, the response by the appeals coordinator is not legible because of his or her scribbling. **[SW-#1]**

RE: requirement that appeals be printed legibly in ink, fails to include any language that either prohibits appeals from being written in pencil or that requires staff to provide indigent inmates with a pen or a pen filler as needed to fill out appeals. **[EKRK-#28]**

I want to submit my disapproval with the font change. **[KNN-#1]** The requirement that printing or typing must be no smaller than 12-point font is an unnecessary technical demand. Very few appellants and likely even staff, have any idea what a “point” even is, let alone how to go about determining whether they are writing or typing “in no smaller than a 12-point font.” Computers in law libraries have word processing functions disabled, so that the ability to determine whether 12-point font size as required by the regulation is satisfied **[EKRK-#30, DF-#4, SH-#1]**

A more appropriate specification is “pitch,” defined as characters of text per inch. A phrase such as “...presented in text no more dense than 15 pitch (characters per inch)” is suggested. This

SUMMARIES AND RESPONSES TO ORAL AND WRITTEN COMMENTS

specification is compatible with typewriters, comparable in density to a 12-point Times Roman font, is larger than most pre-printed text on the 602 form and can easily be measured with a ruler to verify compliance. This change is necessary to avoid confusion and controversy over permitted text size and density, and to ensure appeals are readable. **[SH-#2]**

The restriction to not allow smaller than 12-point font is excessive. When asked if they can make sure they do not write smaller than 12-point, the answer was, "what's a font?," and how big or small is that? Inmates by and large come from educationally disadvantaged segments. I found that 12-font translated to one sixth of an inch, clearly an unrealistic expectation. This 12-font restriction is prejudicial. The form type size [and NCR] appears to be 9-point. Yet the reason state for restricting appellants is that smaller than 12-font is illegible. **[RT-#3, RR-#1]**

The regulations further dictate that no less than a 12-point font must be used. Most appeals are hand written. For prisoners who are fortunate enough to own or gain access to a typewriter, "fonts" are not an option, as the term technically usually refers to computer software. Some typewriters have a pitch change option, but no font adjustment. Few, if any, file appeals utilizing a computer's word processing function. **[KDS-#8]**

It is also wrong to restrict printing or type size on the more important document of the two addressed in the NCR. The Form 22 has no such restriction. It is not as though it should. On the contrary, the 602 shouldn't. **[RT-#4]**

The requirement of only one line of text on each line provided on forms should not apply to single-spaced typewriter text. Alternatively, the forms themselves should provide lines that match the single-space setting of inmates' typewriters, or the Department should provide a separate 602 Form series that does not have any lines at all specifically for use by inmates with typewriters. **[ECRK-#31]**

In the interest of full disclosure and transparency for full account and accuracy of grievances for all involved (including CDCR), I ask that there be enough room to list all parties involved by name, title, the issue, the policy affected and also citation of the policy, regulation and law violated. **[LN-#1]**

While the requirement of legibility is reasonable, unnecessary is the further requirement that appeal content be placed on only one line of text and in no smaller than 12-font type. These provisions invite dismissal of legible and meritorious complaints for technical reasons. The form itself, as well as these proposed regulations, is in smaller than 12-point font. **[CCW-#7]**

RESPONSE: Permission for appeal submissions in pencil is anticipated under the exceptional circumstances clause (see also page 5), challenges to the questionable premise that appeals have or should be anticipatory to lawsuits and erroneous assumptions about offender constitutional rights have already been discussed above in this document. Poor penmanship of appeals office staff aside, clarification of illegible responses can be obtained absent the necessity of changing the rule in the manner requested. Discussion of font vs. pitch aside, the essential point of the rule in question is to ensure legibility and foreclose the unacceptable practice of print or handwriting so minute as to be unreadable (as ISOR page 6 mentioned). Appeal rejection on the basis of this technicality is likely only in those cases where legibility is an issue or an appeal staff directive to correct the size of lettering has been deliberately ignored. Consequently, the necessity for adjustment in the rule as originally promulgated is not compelling. Beyond this, the issue generally has been addressed previously where it was noted that appellants can request additional space and upon presentation of compelling evidence of the need for such space, at any level of review, they will be granted the right to use one or more additional Form 602-A (see discussion, page 24).

3084.2(a)(3) Providing Staff Names and Related Information

Except for appeals specifically denoted staff complaints, these subsection provisions respecting the need to provide all staff names or otherwise make a reasonable attempt to identify staff involved in the grievance should be deleted. Often, a prisoner's grievances concerns a matter for which a large number of individuals, none of whom will be directly known to the prisoner, or a set of individuals are the responsible parties. For example, an appeal regarding dangerous conditions in specific locales could involve housing unit staff, plant operations crew members, associate wardens in charge of custody and business services, others in the local chain of

SUMMARIES AND RESPONSES TO ORAL AND WRITTEN COMMENTS

command, regional and headquarters managers and staff, and possible the Department of Finance, Legislature and Governor. It is unreasonable to require the prisoner to name even all CDCR involved persons. Administrative appeals are not court actions, which sometimes require the naming of particular persons. Administrative appeals are instead a means for prisoners to raise a problem and to have prison officials in charge provide a written response regarding the problem raised. [SF-#3]

This section requires modification because it appears the Department has adopted an rule (or de facto regulation in violation of the APA) that requires use of the Form 22 in order to "provide proof of final actions or determinations by staff when no other process or proof is available." [SF-#5]

The new requirement is unnecessary. The Department has superior access to this information and will in almost all instances be able to identify all staff members involved based on the inmate's description of an incident or problem. An inmate has every incentive to include the names of those staff known to them. But in many instances this information is not available. Inmates, who in many instances have little formal education, are required to complete these forms in most instances without assistance. By notifying the Department of incidents in the appeals form, the inmate has given enough notice that any investigation would have to identify all involved officers. In medical case, inmates are not always provided the names of every provider responsible for their care. In cases where inadequate supervision is alleged, it is unfair to require a prisoner to identify potential supervisor defendants at the early stage of the appeal process, per cited case law. [CCW-#3]

There is not enough room to provide the requested information. Form[s] and attachment[s] should allow the same amount of space for the same amount of characters at the prior space contained in the previous 602 form with a written one page attachment. Updating the form should not reduce the available space to explain the complaint. There should be no deduction in the space available to explain the issue. [C3-#6]

RESPONSE: Once again commenters misrepresent the process. One writer assumes that appeals are simply a pathway to lawsuits which should be allowed to explore possible defendants in order to establish some possible liability. These leads to endless and often pointless litigation. It is to be assumed that if an appellant can identify wrongdoing on a part of a staff member, they may during litigation discover that the person acted on behalf of another. This would be a matter for the courts to consider. However, the appeals process does not exhaust administrative remedies on situations or individuals that are not identified and therefore not subject to review. Also, the CDCR Form 22 is not for use in filing staff complaints, and when inmates are alleging misconduct it is not unreasonable to ask them to identify or assist staff to identify who is involved. When that information is not provided the organization has no way to evaluate the merits of the claim or to take corrective action. With respect to the deduction of available space, see especially response immediately preceding. Finally, superior Department access to information aside, it is essential for appellants to make some effort to identify staff members involved in an incident or problem identified in a grievance. Otherwise, reviewers are left with only speculation, guesswork and the often insufficient description of events provided by the appellant. As mentioned above, this needlessly complicates and often delays an evaluation of the claim and the ability to address the matter in a meaningful manner. To claim that this is unfair borders upon irrationality.

3084.2(a)(4) Stating All Known Facts on the Forms Specified

This concept is limiting for certain issues. [H-#8, EVW-#7]

This requirement (plus listing all staff and describing their involvement) coupled with limiting the appellants to the space provided on the new forms is another instance of impeding both exhaustion of remedies and the access to courts principle based on the obvious position that not all of the facts were included in the appeal when originally submitted. [JLM-#12]

Inmate 602s are constantly being denied because they fail to corroborate their complaints and [so] restricting the amount of information they can put of a 602 only makes it more challenging to prove their point. [KC+CM-#2]

The primary purpose of a grievance procedure is to alert the prison to a problem and to facilitate its resolution. The proposed change does not further this goal, but instead is a cynical ploy to

SUMMARIES AND RESPONSES TO ORAL AND WRITTEN COMMENTS

allow counsel for staff members who are not named in subsequent litigation to seek dismissal based on a technical "party exhaustion" argument. [CCW-#4]

The same can be said of the requirements of stating all facts known at the time and obtaining and attaching all supporting documents. The Department is providing a short form with a short attachment, but is essentially imposing a detailed "pleading" requirement on inmates. Again, this is an unnecessary and cynical attempt to set up potential dismissal in a any subsequent litigation base on an inmate's omission of some detail or documentation that in most circumstances will be know to any investigator who is provided with the basic information about a problem or incident. Current regulations requiring a simple description of the problem and action request are sufficient and the Department has not demonstrated sufficient grounds for making a change of this magnitude. [CCW-#5]

RESPONSE: Once again, it should be stressed that, upon demonstration of the need for additional space to describe additional facts, appellants will be allowed such space. However the argument that there should be no constraints on content and that appellant's should be allowed to exhaust on a problem generally without identifying who is involved or responsible simply invites abuse. Just as in a court proceeding at some point in time you must identify your evidence, so in the administrative review process you should, with the assistance of staff if necessary, be able to identify who and what is involved in the appeal. These comments clearly see the grievance process as merely a means for the pursuit of litigation, and wrongly assert that the rule is intended to be a deliberate obstacle to that end. In reality, the intent is quite simply to facilitate grievance resolution through the disclosure of information essential for that purpose.

3084.2(b)(1) Supporting Document Attachment

The rule is objectionable because it limits the appellant's ability to attach relevant documents to the appeal, except those necessary to clarify. Additional documents may be necessary to substantiate, verify, or otherwise enhance the appeal. Accordingly, the appellant should have the right to attach any relevant document. Also this section directly conflicts with proposed 3084.3(b) which allows attachment of documents for clarification and/or resolution of his or her appeal issue. [DAM-#3]

This provision should be deleted, given the definition in found in 3084(h): Supporting documents means documents that are needed to substantiate allegations made in the appeal. A prisoner's grievance is not akin to a formal trial, or a substantive legal motion in which evidence should be required. An appeal is a mechanism by which a problem can be brought to the attention of prison officials, and indeed are entirely available to the official responding to the appeal, via computer digitized records (such as all documents in the prisoner's Central File. [SF-#4]

Prisoners should not be limited to attachments which "clarify" the grievance, [rather] allowed to attach any document which is necessary to not only clarify, but support, substantiate or enhance the appeal. Any relevant document should be allowed to be attached. The meaning of the word "clarify" is left open to interpretation and is subjective. Also, this section, as written conflicts with 3084.3 [C3-#7]

RESPONSE: To rephrase and reiterate ISOR page 7, the reason for this regulation includes keeping appellants from endlessly arguing the merits of their case through voluminous attachments or creating a smokescreen of collateral issues by attaching other appeals or court decisions as exhibits. In the course of the appeal process such appellants were known to change the focus of the appeal based upon that content contained in so called "supporting documentation" exhibits which afforded them the best chance of obtaining a favorable judgment. Attachments needed to document what is appealed are acceptable (and for the most part, essential), attachments which simply argue the merits or which can be simply cited, are not. Case or statutory citation, with pertinence referenced, serves as a perfectly acceptable and preferable alternative to the oft encountered practice of attaching printed versions which can be looked up by reviewers. Contrary practice proliferates paperwork unnecessarily, and hinders efficient problem resolution. As this document repeatedly stresses, there is a presumption that flows through many of the comments submitted, including those about this subsection, that no

SUMMARIES AND RESPONSES TO ORAL AND WRITTEN COMMENTS

restraints should be placed on the process. Inherent within that argument is the insistence that unlimited resources should be made available. Unfortunately the reality is that the process must operate through a finite set of resources provided by the taxpayer. Under this scenario it is clear that overuse by one party will result in a lack of access for others. The goal of the new regulations is to ensure meaningful access to all, and for that reason alone, no other alternative is more effective or less burdensome.

3084.2(b)(3) Prohibit defacement or attachment of dividers and tabs

The rule is objectionable because it is contradictory, unnecessary and may detract from the effectiveness of the appeal. How can an inmate deface a divider or tab which is not allowed in the first place? More importantly, dividers or tabs are not only necessary, in order to separate exhibits attached to the appeal form, but highly desirable, since each document attached may involve multiple pages. **[DAM-#4]**

Remove this [provision]. Prisoners should be allowed to “tab” or “section” the supporting documents in the appeal. This can only add to the order and clarity of an appeal. This makes no sense and just handling in a pile of unorganized papers could in fact be detrimental to an appeal.

[C3-#8]

RESPONSE: Nothing in the provision in question implies that appeals have to be submitted in a disorganized manner, nor does it specify that appeal submissions will be rejected on the basis of poor or non-existent internal organization. A logical sequencing on the basis of form number progression (602, followed by 602A, followed by 602G [if pertinent], followed by supporting documentation) is commonsensical, but has not been made mandatory. Appeals submission paperwork will be organized if needed by appeal office staff and this requires no regulatory enshrinement. What is being prohibited, however, are submissions with dividers or tabs, because doing so unnecessarily adds another processing step. Tabs and dividers have to be removed (and discarded) when photocopying. Certainly, submitters are free to list or provide a table of contents for organizational clarity, if such is desired. As ISOR page 7 makes clear, appeal form defacement and divider or tab attachment are two separate matters and therefore the commenter perceived “contradiction” is nonexistent.

3084.2(g) Prohibiting appeal submissions on behalf of another

Where proposed regulation 3084.2(g) states “[a]n inmate or parolee shall not submit an appeal on behalf of another person,” such language and requirement should clarify that “on behalf of” does not mean merely mentioning some other person(s) at Section A of an appeal who simply happened to witness, experience or otherwise be personally involved in the events and circumstances being appealed, but rather requires that the actions(s) requested at Section B of the appeal form somehow specifically focuses on benefiting such other person(s) instead of the appellant only. **[ECRK-#35]**

RESPONSE: The provision in question retains in revised form the pre-existing rule permitting rejection of appeals filed on behalf of another inmate or parolee [superseded 3084.3(e)(7)]. The possibility that any misinterpretation would resemble the concern expressed is remote, if not impossible to imagine. Moreover, the problem has never emerged previously, and poses little risk for occurrence. The request highlights contradictory commenter desires with this particular commenter representing one of the extremes. One group objects to increased complexity, others (with this particular commenter leading) would have the rules conditioned with various additives to the opposite pole of complexity. Besides, the argument is classically specious. To file on behalf of another is a descriptive no different than, for example, filing a lawsuit on behalf of someone else. There is nothing inherent in such language to suggest that this excludes the involvement of others as witnesses or as in the case of a group appeal, even eventually co-defendants. No disclaimer is warranted, any suggestion for one being specious reasoning.

3084.2(h) Group Appeal

SUMMARIES AND RESPONSES TO ORAL AND WRITTEN COMMENTS

Subsection (h)(6) statement that group appeals count toward each appellants' allowable number of appeals seems too restrictive, unduly burdensome and likely to result in many inmates being unconstitutionally deprived of and otherwise denied their guaranteed 1st amendment right to assemble and associate for purposes of supporting each other in exercising the right to petition for redress grievances that adversely affect more than just a single inmate. If CDCR wants to penalize inmates who participate in group appeals by making such participation count toward the allowable number they may submit within so many days, then the Department should be required to provide every group appeal participant with his or her own copy of the entire appeal and each response from each level of review to facilitate copy presentation later to demonstrate his or her exhaustion of administrative remedies in regard to that particular issue. CDCR should also be required to ensure that a copy of every completed group appeal gets placed in each participant's central file, as presently occurs only with respect to individual appeals, and the Department should remove language which makes the inmate or parolee who actually submitted the group appeal "responsible for sharing the appeal response with the inmate or parolees who signed the appeal attachment" [ECRK-#36]

A person uses his/her bi-weekly allotment by participating in a group appeal. This is wrong. An individual is not the same entity as a group, and should not be penalized for participating in a group appeal. This serves as a further indication of the Department's intent to deprive people of their right of seek grievance redress. [WR-#9]

RESPONSE: As previously noted, a compelling need addressed by these regulations is how to provide meaningful remedy with limited resources. If group appeals are not counted, the limits mean nothing since litigious, vexatious and just plain resentful inmates (particularly those who think the department is motivated to "punish" appellants, as the above commenter asserts) will simply initiate large numbers of group appeals, thus circumventing the limits intended by the PLRA. The notion that every group appeal participant should receive their own personal copy throughout the levels of review and that copies should be placed in central files ignores the existence of fiscal constraints as well the added paperwork burden that would result. The allegation of supposed constitutional right deprivation has been already addressed and repeated often elsewhere in this document. Finally, there is no compelling reason to abandon the existing approach of having the primary appellant to share appeal outcomes with co-appellants. It has sufficed in the past and absent the availability of resources to do otherwise, which is wholly unlikely, the alternative is not more effective or as effective and less burdensome.

3084.2(d) Indigent Mail Provision

This subsection requires appeals be mailed via the USPS for 3rd level review by utilizing the prisoner's own funds. It is not necessary to encumber a prisoner with the expense to postage to mail to Sacramento. It could just as easily be submitted to the Appeals Coordinator at the institutional level, and sent by the institution at no or very nominal expense. Since 3rd level appeals often contain weighty exhibits, the cost burden becomes a significant financial disincentive to seeking 3rd level redress. The Department, on the other hand, has its own inter-prison mail system and would incur no added cost [a decision by the Solano Superior Court must be followed]. [DF-#6]

Such language, limitation and requirement seems too restrictive and overly burdensome on the right of inmates to petition the government for redress of grievances. Neither the Prison Litigation Reform Act or subsequent court ruling holds that inmates must possess postage stamps, have sufficient funds in their prison trust accounts, or hoard their monthly allotment of indigent-status envelopes in order to get their administrative grievances and appeals reviewed and exhausted at the final level. Not only would such a limitation and requirement seem to render meaningless the right of citizens, including indigent inmates, to petition for redress of grievances, but also such limitation has the potential to directly discriminate against indigent inmates by denying them access to the courts solely by reason of their financial inability to mail grievances. It should be noted that the Inmate Appeals Branch (IAB) is not itself required to use the US Postal Service for corresponding with individual institutions and returning appeals to inmates. Instead, IAB and individual prisons correspond postage-free through non-USPS couriers. Further, Solano County

SUMMARIES AND RESPONSES TO ORAL AND WRITTEN COMMENTS

Superior Court has ruled that CDCR inmates need not send their appeals through the USPS, but rather may submit them via intra-institutional mail to appeals coordinators, who then are responsible for forwarding to IAB. The proposed regulation should provide this procedure at least to indigent inmates. [ECRK-#32]

RESPONSE: The allegation of supposed constitutional right deprivation has been addressed on pages 3-4. Notwithstanding the undisputed existence of an internal Departmental mail delivery system, the provision in question resolved an inadequacy in the superseded rules with respect to the transmittal of appeals for Third Level review. Incarcerated offenders have always been expected to bear the burden of communicating with entities outside the institution or facility at which they are domiciled, including when posing complaints or grievances addressed to or about the head of this and/or other agencies. In addition, for increased peace of mind and confidentiality, there always has been a decided preference for external mail services for such transmittals over reliance on other means by appellants in the past. Nothing in the rule expressly prohibits the transmittal of the appeal for Third Level appeal via intra-departmental mail, if that method is chosen and the local mail room is willing to do so. On the other hand, no guarantee as to the delivery, security or promptness of transmittal can be afforded thereby, and for this reason the suggestion for a rule to mandate such a practice is not more effective or as effective or less burdensome. It should be noted that the Department is willing to undertake expedited transmittal responsibilities and cost in the context of emergency appeals. Since the number of emergency appeals is expected to smaller in volume, this can be accomplished within the fiscal and staffing constraints already mentioned, whereas an commitment to do so for all appeals would risk over commitment, aside from the other noted issues. Finally, the intention of this rule plainly is to afford indigent inmates the same processing options available to all inmates, not to discriminate against them. Should the rule have the unanticipated consequence of doing so in the manner posed in the hypothetical, indigent inmates have the recourse of filing an appeal about the financial hardship (as an emergency appeal, if necessary) and a remedy can be effected within the scope of the exceptional circumstance clause.

3084.3 Supporting Documents

Lack of supporting documentation is the most uniformly used reason for screen-outs, even if supporting documentation is totally unnecessary. For example, printed menus are not provided because they appear on the TV system. So am blocked on any menu-related appeal because if I press the issue, I will be deemed an abuser. [JDR-#10]

RESPONSE: Significantly more clarity has been added to the Appeals Abuse provisions of these rules (see ISOR pages 8 and 9). Warning letters and mandatory meetings are now required. Therefore, in the future, before the scenario posed could be deemed abuse, the commenter would be notified in writing with a follow-up meeting as needed to clarify the matter. Ultimately, the matter could be pursued up to the Third Level. How the fact that menus are unpublished, in and of itself, poses a documentation problem is unclear. Appellants are free to cite the time and date of menu screening or even the meal in question, which should provide appeals and/or responding staff information sufficient to ascertain the validity or merit of the complaint. This is not to say, however, that screen-out or rejection may be made on some other basis, and that the comment is based upon some confusion or misunderstanding held by the commenter.

3084.4 Appeal System Abuse

The creation of this section is a really bad idea and contrary to the sentiment that no reprisals shall be taken against inmates exercising the right to appeal. The sentiment was always violated, but now any frustrated inmate of anything less than average intellect who may very well have a valid claim, while trying to navigate all of the procedural pitfalls now in place, can be deemed an appeals abuser and sanctioned [accordingly]. Now there is a cloud of impending threat ever present in the back of the mind of anyone considering an appeal that will be weighted when deciding whether or not to file. [JDR-#3]

SUMMARIES AND RESPONSES TO ORAL AND WRITTEN COMMENTS

RESPONSE: Commenter assertions to the contrary, this section is not new (see ISOR pages 8 and 9). In some cases more clarity has been added, thereby providing more procedural safeguards for the appellant. In other instances, new standards have been established to end behaviors that seriously impede the appeal process. These include making knowingly fraudulent statements which divert staff from solving problems to refuting fraudulent misrepresentations.

- The standard for taking administrative action in such instances is high in that there would need to be an RVR finding that the appellant knew that his statements were fraudulent at the time he made them and that they were not raised as a defense to a charge, or as a result of ignorance or incapacity, but rather reflected a conscious effort to defraud the state or slander staff.
- The appeals process was never intended to facilitate or enable such behavior and lacks sufficient resources to meet fulfill its own mission without having to get caught up in policing inmate behavior. Thus the appeals process would only be responding to an adjudicated decision of the disciplinary process for infraction involving appeals.

Although abuse used to be defined as submitting excessive appeals due to the workload impact, it was readily apparent that an equally important influence on the workload was inmates who routinely resubmitted old appeals or refused to follow directions when submitting new appeals, and did so over and over. So now this too is abuse.

Neither of these things contributes to an inmate's access to remedy as they both involve behaviors that cannot possibly lead to an appeal being accepted. To ensure that inmates who lack the capacity to fully understand the regulations are not ensnared in the abuse process and denied access to remedy, no sanctions can be effected without first conducting a face to face interview, giving the appellant clear instructions as to what is expected and only after review and approval of the restriction by IAB.

The perception articulated inelegantly illustrates how the APA public comment process subjects the Department to world view divergence for which rational responses are an impossibility. Safeguards are perceived to be pitfalls by commenters and simply continuing preexisting requirements creates for commenters a "cloud of impending threat."

3084.4(a)(1) More than one appeal every 14 days considered excessive

This rule is objectionable because it imposes a one every 14 day restriction without any justification for such a restriction. Accordingly, it is completely arbitrary. An inmate may experience an act or disadvantage which requires an appeal and then only a few days later need to appeal from a completely different action. Because of the deadlines imposed, the inmate may be arbitrarily deprived of submitting a timely appeal of a subsequent matter. You have proposed other regulations which discourage and prohibit arbitrary and excessive numbers of appeals, which accomplish the same purpose as this rule. **[DAM-#5]**

RESPONSE: Contrary to commenter claims, justification for the restriction in question is provided on ISOR page 6, in conjunction with the explanation for the changes in 3084.1(e). Accordingly, the change is not "completely arbitrary." The Department has deemed this provision, together with others, as necessary for improved workload management for the good of everyone in a way that does not negatively impact access for any individual in particular. Using the logic inherent in this statement, any limitation on the number of appeals could be deemed arbitrary. This would lead to endless appeals which given current resources would "crash" the system, as this document frequently points out in other section-specific responses.

3084.4(a)(3) Knowingly false or deliberate distortion of facts

No ISOR explanation is provided as to why this new criteria is needed. Such criteria is very subjective as an appeals coordinator (AC) cannot know what is inside the mind of an inmate. There is no language that helps the AC to make such a determination. What one inmate might deem an appropriate description of the facts as he perceives them on the basis of information at their disposal might be deemed by the AC as false. In such circumstances the appeal will not be processed as the AC will take it upon him or herself to interpret and apply the facts of the

SUMMARIES AND RESPONSES TO ORAL AND WRITTEN COMMENTS

appeal without any investigation. A difference of opinion as to facts should not be used to deem an appeal false and subject to rejection, therefore redact this rule. [AG1-#3]

Such language seems vague, hyper-technical and unconstitutionally burdensome of the right to petition. Inherent in all adversarial/accusatory proceedings, by which legal redress is sought through litigation-related activities such as administrative grievances and appeals, is the deliberate attempt by the opposing parties to distort the facts in a light that most favors them or their particular legal position. Indeed, the Department itself would likely find it very difficult to retain employees of the Attorney General suddenly had to defend them in court without deliberating attempting to distort the facts concerns the violations the employees commit on a regular basis. [ECRK-#37]

RESPONSE: In the manner ISOR page one explains, the text in question updates and replaces 3084.4(b) whereby an appeal containing false information was subject to rejection. The wording has been adjusted to specify “knowingly” and “deliberate” to modify “false” and the added word “distortion.” This reworking of existing text is intended to address precisely the commenter concern about distinguishing representation of false matters mistakenly understood to be true from concocted falsehoods. It is only upon evidence of the latter, as opposed to the possibility of the former, that the provision will be applied, and therefore the request to redact is declined. Deliberate and obvious distortions of fact only undermine the credibility of the appeal process itself, with both staff and inmates. If there are no sanctions for such deliberate deception some inmates feel obligated to say whatever suits their purpose since there is no advantage to being truthful. While it is understood that there may be differences in perception, some inmates suffer from conditions that distort their perception of reality (see also page 35 discussion) and all people have an inherent right to defend themselves against charges. Their defense should not be subject to sanctions based upon some later determination that it was false. On the other hand blatant and intentional falsifications with a view to defrauding the state, manipulating their program or slandering and affecting the working conditions of staff do require some effort at restraint. This is why the rule is in place. It should be noted that correctional staff are also subject to sanctions including termination, if it is determined that they are lying about something. For that reason, the Department strongly objects to any commenter suggestion that “factual distortions” are deliberate or integral to the appeal process, AG defense of staff in court aside and litigation-related or not. Indeed, if assumptions of this sort are representative of the mind-set appellants commonly bring to the grievance process, then the text as presented is most appropriate. Otherwise, the Department would be entirely vulnerable to openly false and untrue appeals; being unable to screen out regardless of the falsehoods contained therein.

3084.4(a)(4) Threatening, derogatory, slanderous or obscene appeal statements

Such language seems unconstitutionally vague and overbearing, as well as in direct conflict with multiple rulings by federal courts staking down punishment of inmates for exercising the right of expression in written form, especially when such written expression is related to petitioning for a redress of grievances. Cited case law includes opinions inclusive of the following statements: “...prison officials may not impose sanctions against an inmate for using disrespectful language in a written grievance even if that language is hostile, sexual or threatening...” “...debate on public issues should be uninhibited, robust and wide-open and ...it may well include vehement, caustic and sometimes unpleasantly sharp attacks on government and public officials...” [ECRK-#38]

This provision is subject to abuse as proposed. Consider the situation in which an inmate alleges that staff used threatening, obscene or abusive language. In order to contain sufficient detail, the appellant faces punishment for including that very language in a grievance. The regulations need to be corrected to prohibit obscenity that is not the subject of the allegation contained in the 602.

[CCW-#8]

RESPONSE: In the manner ISOR page one explains, the text in question updates and replaces 3084.4(b), whereby an appeal containing inappropriate statements, profanity or obscene language was subject to rejection. The current wording has been adjusted to create greater specificity with respect to what is considered “inappropriate.” These adjustments are intended to

SUMMARIES AND RESPONSES TO ORAL AND WRITTEN COMMENTS

remedy precisely the commenter concerns over the vagueness of superseded text. It is important to realize that appeals initially rejected on this basis do not suffer the fate of permanent rejection as was the outcome in the decided cases referenced above, but rather may be resubmitted, after removing or toning down the objectionable language. Operational guidance has already been provided advising appeals staff to exercise care with respect to the appellant's use of obscenity so as not to appear to be suppressive of free speech, in the instance of an occasional word for emphasis or in the context of a coherent system of belief. Such admonition would obviously extend to any direct quote of verbalizations contained in a staff complaint. Furthermore, only if the repeated use of such language is deliberately insisted upon—after a warning letter, meeting and other safeguards—and without any explanation of why it is considered necessary will any appeal sanction be imposed, and that sanction is appeal restriction. Even with imposition of appeal restriction, emergency and other appeals will be accepted from such individuals under the emergency and/or exceptional circumstance provisions of these rules.

3084.4(a)(5) Deliberately Exceeding Space Provided

The provision that deems misuse or abuse as instances when problem descriptions or requested action deliberately exceed space provided on the 602 forms and the rejection provision [3084.(b)(9)] pertaining to situations where the appeal issue is obscured by pointless verbiage or voluminous unrelated documentation places the appellant in a potential catch-22 position, where too little detail or documentation will result in denial, but too much detail or documentation yields the same result. Current regulations are sufficient. "If it ain't broke, don't fix it." **[CCW-#6]** Who determines and what is the criteria being used to determine if an action "deliberately" exceeds the space provided. This language is highly subjective. **[C3-#9]**

RESPONSE: The option of leaving these provisions unchanged is unacceptable. As has been repeatedly discussed elsewhere, superseded regulatory language was excessively vague and abetted numerous problems including pointless verbiage and the attachment of voluminous unrelated documentation. Circumstances of "deliberately" exceeding the provided space relates to the possibly of instances where an appellant chooses, after being instructed otherwise by appeals staff, to exceed the space provided for problem description or requested action. The space in question is provided not only on the Form 602, it continues onto the Form 602-A. Any matter so complex as to require additional space can be accommodated, at the discretion of the Appeals Coordinator, under the exceptional circumstance clause. Also, additional clarification can be provided at the time of initial interview. No substantiating documentation will ever be denied appellants, if appropriately brought to the attention of appeal officials. Furthermore, it is interesting that on the one hand critics of the system complain that responses are inadequate and untimely. On the other hand they object to limitations on the amount of verbiage staff must wade through to process an appeal. It should be self evident that allowing individuals with limited verbal skills to endlessly opine on a topic in often illegible handwriting creates considerable workload and cost. But what is worse, instead of providing greater clarity it almost always results in the actual issue being obscured or lost in the myriad of arguments put forward. The new rules are designed to provide greater clarity so that issues can be addressed in a timely manner. As this document has already stressed, in those instance where the situation is complex and more space is needed to elaborate on the facts or issue, the appellant may request permission to attach additional attachment and upon presentation of compelling evidence of such a need, permission will be granted.

3084.4(b)(1) Screening and Processing

There is no language which describes the inmate's role when an appeal is screened-out. A rule is needed which allows an inmate the opportunity to rebut a screen-out decision which an inmate feels was inappropriately applied. Appeal coordinators misapply rejection criteria and refuse to accept an informal written rebuttal on the screen-out decision. An inmate is then forced to submit a whole new appeal on the screen-out decision, which the appeals office rejects because screen-out decisions cannot be appealed. This leaves the inmate unable to pursue the original appeal and unable to appropriately challenge the screen-out decision. **[AG1-#4]**

SUMMARIES AND RESPONSES TO ORAL AND WRITTEN COMMENTS

Include language setting forth what steps to follow when appeals are rejected for reasons the appellant want to challenge as clearly erroneous or contrary to law. [ECRK-#42]

RESPONSE: This comment is no longer correct, see specifically §§3084.6(a)(2) and (a)(3) and (e). A cancellation decision can be appealed. Therefore an offender can rebut a rejection notice. If the AC determines that the rebuttal is incorrect and the appellant refuses to comply with the directions, the appeal will be cancelled and the appellant can then, if need be, appeal the cancellation decision all the way to the Secretary's Level.

3084.4(c), (d) & (e) "Noncompliant" Appeals/Meeting before Imposition of Restrictions

Where the cited subsections refer to "noncompliant" submissions, such language seems vague and capable of being too easily misused by staff, for there has long been a practice by institution appeals staff to reject inmates' appeals solely on the basis of arbitrary and capricious mere whims, bias and prejudice rather than any specifically articulated reason authorized by an existing regulation. In turn, inmates who know the regulations better than most resubmit rejected appeals with written explanations challenging such rejections as being clearly erroneous and/or contrary to law, whereupon appeals staff become so annoyed and defensive upon being challenged that they dig in their heels and stand by their rejections; completely irrespective of any regulation or argument advanced by the appellant proving their challenges. Eventually, appeals staff order inmates to not resubmit their rejected appeal and threaten them with appeal restriction for failing to cooperate with the challenged rejection notices. This text should therefore be clarified to mean appeals that are clearly out of compliance with some existing regulation(s) and do not include rejected appeals resubmitted with written explanations challenging rejections as clearly erroneous, contrary to law, unsupported by any existing regulations(s), obstructive, and/or otherwise not in furtherance of a legitimate penological objective. [ECRK-#39]

This section does not address the fact that an inmate who disagrees with the screen-out decision and is prevented from submitting a written rebuttal and is prevented from appealing the screen-out decisions has no alternative but to continue re-submitting the appeal. I suggest that a provision be added to permit inmates the opportunity to submit a written rebuttal on the screen-out decision before any warning letter or face-to-face meeting. If the written rebuttal provided by the inmate is insufficient to overturn the screen-out decision, then allow the inmate the right to file an appeal on the screen-out rejection decisions. [AG1-#5]

RESPONSE: See response immediately above. Resubmitting without comment accomplishes nothing and an eventual cancellation is appealable. Since no textual deficiencies exist, requests by commenters for regulatory clarification are declined. Incidentally, it should be observed that many of the suggestions for change made here (and elsewhere by this and other commenters) would necessitate creation of lengthy and complicated rules, to which others most strenuously object.

3084.5(b) Staff under Appeals Coordinator Oversight

Such language should mandate that all delegated staff must receive special training in the screening and processing of appeals and shall be required to take and pass related tests both prior to performing and appeals-related duties as well as periodically throughout the time they are assigned such duties. Without delegated staff being thus trained and tested, offenders' constitutionally guaranteed rights to petition for grievance redress and/or exhaustion of available administrative remedies in order to proceed in the courts risks being unduly infringed upon by the arbitrary and capricious whims of staff despite of regulatory language. [ECRK-#40]

RESPONSE: Comments extending beyond the regulatory content of these rules and, specifically, into the context of personnel staffing and training do not require a response. Nevertheless, pending DOM amendments will specify the following: "Delegated staff under appeals coordinator direction shall be properly trained, audited regularly and undertake only those duties and responsibilities appropriate to their job classification, background and experience."

SUMMARIES AND RESPONSES TO ORAL AND WRITTEN COMMENTS

3084.6 Rejection Criteria

The proposed methodology for streamlining and unclogging the grievance system is the reduction of the number submitted into the system. The Department has elected to reduce this number by granting itself overly broad rejection and cancellation criteria. **[SD & KB-#2]**

All the new additions have stultified the appeals process by creating a procedural minefield that only inmates of above average intelligence will be able to navigate, and even then, not successfully given the broader scope provided coordinators to screen out appeals. The old way was nearly impossible to get an appeal accepted, but now it is impossible [as] they have [been transformed into...] master screen out coordinators. **[JDR-#2]**.

Rejection criteria in many cases [...were and will continue to be...] abused by appeals coordinators. **[BKB-#2]**

The proposed regulations grant coordinators undue screening powers. **[SM-#4, JP-#4, MB-#4]**
Include language to inform and advise employees that offender's right to avail themselves of the grievance procedure is subsumed under the 1st Amendment of the Constitution and that any intentional interference with such right shall be cause for disciplinary action pursuant to law and Departmental policy. **[ECRK-#41]**

Include language setting forth what steps to follow when appeals are rejected for reasons the appellant want to challenge as clearly erroneous or contrary to law. **[ECRK-#42]**

Appeal coordinators issue screen-out decisions on a piecemeal fashion. For example, one rejection criteria will be applied to reject the appeal. When the inmates complies with that criteria, the appeals office will find another reason to screen-out the appeal. This continues in an effort to wear down the inmate and discourage the further submission of the appeal. Appeal coordinators should be required to state all the screen-out rejection reasons during the first screen-out and prohibited from using repeated screen-out decisions which could have been applied with the appeal was initially submitted. **[AG1-#6, EDC-#1]**

Subsection 3084.6(b) should omit the phrase "but are not limited to" and list only the specific reasons staff shall be legally authorized to reject appeals. This language is capable of being too easily misused by staff a justification for rejecting appeals on the basis of inappropriate, fabricated or unauthorized reasons. For example staff at one institution might interpret such text to mean they can reject appeals written in cursive rather than printed text. Appeals might be rejected for containing misspelled words. Staff could even start demanding that appeals state what regulations, statutes, constitutional provisions support the appeal issue. Include language setting forth what steps to follow when appeals are rejected for reasons the appellant want to challenge as clearly erroneous or contrary to law. **[ECRK-#43, LB-#7, C3-#10]**

Subsection 3084.6(b)(1) is highly objectionable because it arbitrarily prohibits inmates from appealing and resolving matters before harm and damage are incurred. Accordingly, this proposed subsection unnecessarily prohibits a highly desirable use and purpose for an administrative appeal, without justification or necessity for such a restriction. **[DAM-#6]**

(b)(1) should be clarified to not prohibit appeals concerning adverse effects that are reasonably likely to occur without formal intervention. For example, if an inmate has been or is being subjected to a certain condition of confinement that he or she believes increases risk of suffering injury or harm to physical, mental and/or physiological health and/or safety, the appeal regarding such condition should not be rejected on the basis that the threatened injury or harm has not yet been suffered (in accordance with cited case law). **[ECRK-#44]** Delete this section. It conflicts with 3084(c), which states "reasonable likelihood of such harm or injury." **[C3-#11]**

Rejection criteria set forth in (b) (2), (3), (4), (5), (6), (10) are objectionable for the reasons already provided (vague, susceptibility for misuse, unconstitutional, etc.). **[ECRK-#45]**

(b)(5): There is not enough room on the forms to discuss all issues and parties involved. **[C3-#12]**
The rule is objectionable because it rejects appeals which do not demonstrate "a material adverse effect" on an inmate's welfare to adverse effects which have already occurred, and may be too late to adequately remedy. Accordingly, "welfare" should be modified to "welfare or potential welfare. **[DAM-#7]**

I can foresee abuse of (b)(4) and (6) since anything that exposes a person holding a supervisory or division head position that fails to perform their duty will be rejected. The typical response is to down-play the facts and fail to investigate and collect evidence that may be adverse or bring

SUMMARIES AND RESPONSES TO ORAL AND WRITTEN COMMENTS

discredit to the department. Example provided points to failure of supervisory staff to properly review reports and compel staff to produce intentionally omitted relevant information mandated in use of force allegations. **[BKB-#4]**

Subsection (b)(5) is objectionable because it imposes a one every 14 day restriction without any justification for such a restriction. Accordingly, it is completely arbitrary. An inmate may experience an act or disadvantage which requires an appeal and then only a few days later need to appeal from a completely different action. Because of the deadlines imposed, the inmate may be arbitrarily deprived of submitting a timely appeal of a subsequent matter. You have proposed other regulations which discourage and prohibit arbitrary and excessive numbers of appeals, which accomplish the same purpose as this rule. **[DAM-#8]**

Appeal coordinators will abuse subsection (b)(16) since one may seek to clarify by contrasting why something is not right and based on past personal experience I can see a coordinator claiming an entirely new issue is being raised so as to reject the appeal. **[BKB-#5]**

Subsection (b)(8) is another favorite for abuse, particularly when a prisoner is explaining a constitutional problem that needs correction and also sets forth staff misconduct that prompted the pursuit of administrative review. **[BKB-#6]**

Subsection (b) (10) should clarify that "an original" only refers to the Forms 602, 602-A and 602-G and does not apply to the originals of an appeal's supporting documents and lower-level responses. **[ECRK-#46]** This arbitrary statement to reject the 602 because it is a copy directly conflicts with 3084.2(b) which states a copy can be submitted when the original is not available.

[C3-#13]

Subsection (b)(12) is objectionable because it is contradictory, unnecessary and may detract from the effectiveness of the appeal. How can an inmate deface a divider or tab which is not allowed in the first place? More importantly, dividers or tabs are not only necessary, in order to separate exhibits attached to the appeal form, but highly desirable, since each document attached may involve multiple pages. **[DAM-#9, CS3-#8]**

Rejection and cancellation forms were not included with the notice. **[LB-#6]**

(b)(15) should be modified because it is vague with respect to whether the referred to "lower levels" are solely within the actual administrative appeal process. The rule should be clarified such that it is clear that the written request process enshrined in 3086 is not among the lower levels for which a 602 appeal may be rejected if the prisoner fails to use it. **[SF-#7]**

RESPONSE: Excessively expansive claims of constitutional right "infringement" on the part of commenters, the inappropriateness of expecting grievances to function primarily as a lawsuit precursor, how staff will be provided uniform operational guidance on a wide variety matters to mitigate against interpretive disconformities, rejection of all blanket accusations of supposedly intentional staff abuse and overcoming "limitations" in form space have all been discussed elsewhere on preceding pages. The argument that one appeal every fourteen days is unduly and unnecessarily restrictive also has been previously refuted [see beginning page 33]. The meaning of one issue has also been addressed so that the contention that related issues might be excluded is unfounded. Likewise, issues flowing from a single event or having a common nexus are permitted. The requirement that the appeal be the original does not contradict language that allows for a "treat as original copy" notation when the original is not available. But in that case the approved copy is treated as the original. The rationale for excluding tabs, as already pointed out on page 40, is that it is a major workload issue when dealing with documents that must be copied multiple times. Alternatively, pages can be marked without affecting the copying process, however tabs must not be used for the reasons reiterated.

Revision of Subsection (b)(10) is not necessary (comment notwithstanding) because the "original" referred to in the text in question is clearly in reference to forms and not supporting documents, which are the topic of an entirely different subsection. Likewise, rejection and cancellation forms are purely operational in character and as such would not be expected to be included in NCR #11-02 (furthermore, an explanation appears on ISOR page 4). Likewise, as ISOR page 1 explains, much existing language of the article was retained or minimally revised in Sections 3084.2 through 3084.9. This is the case specifically with respect to the (b)(1) provision permitting rejection of appeals about anticipated actions or decisions. The claim that it is arbitrary, without

SUMMARIES AND RESPONSES TO ORAL AND WRITTEN COMMENTS

justification and therefore deserves to be eliminated is mistaken because this is a pre-existing rule, formerly located in superseded Subsection 3084.3(c)(3).

Other concerns articulated by commenters reflect a profound misunderstanding of the purpose of an appeal rejection.

- A rejected appeal is not cancelled. The intent of greater specificity is not to create a complex “minefield” for appellants to navigate but rather to provide greater clarity for screeners and reduce the current level of subjectivity that leads to improper cancellations.
- Screeners are required to return a screened appeal back to the appellant with clear directions as to what needs to be done to correct any identified deficiencies. Therefore while it would be helpful for inmates to fully understand the screening criteria (as have been much more fully set forth in the rules—“overly broad” being a hostile commenter characterization only). Even if they do not, however, it will have no impact on the ultimate resolution of the appeal issue since by simply following directions they can bring their appeal into compliance with submission standards.
- And, although there have been instances in the past of institutions rejecting appeals repeatedly citing only one problem at a time or on a piecemeal basis, (as noted) this is contrary to best practice and all institutions have since been advised that a screening notice should advise the appellant of *all* deficiencies which require attention. If evidence to the opposite is brought forth to the Third Level, any error will be rectified in favor of the appellant. Additionally, increased specificity decreases coordinator discretion and screening power, as opposed to commenter claims to the contrary. The basis for rejection and cancellation has been narrowed by having been made explicit when previously it was vague or non-existent with correspondingly greater coordinator latitude.

The suggestion that the language “not limited to” give coordinators excessive discretion by which to harass inmates also shares the same weakness as many of the above arguments posed by commenters.

- Since the intent of the rejection process is to ensure that an appeal is complete and thus able to be processed, the flexibility in process objected to is actually to the appellant's advantage.
- If something that would impede the processing of the appeal is not identified and the appellant given a chance to correct, it could unnecessarily result in a denial based upon a processing defect unrelated to the actual issue under appeal. Hence this language obviously is intended to assist, not harass appellants.

Then there is the reoccurring misunderstanding of “material adverse effect.”

- For example, one writer notes language that allows someone to appeal where there is a likelihood of future harm but then argues that the language regarding “material adverse effect” contradicts that language. This is not true. A future harm may be material, adverse and demonstrable, as long as it is not purely speculative but in or for which the appellant provides some evidence that demonstrates a likelihood of harm.
- Another writer had contended that constitutional violations would not meet the standard of “material” or “measurable”. Since all training material focuses on the fact that something is not material if it cannot be described or addressed (such as the “state of mind” or “prejudices of staff” absent any descriptive facts) and directs appeals staff to encourage the appellant to provide additional information, it should be evident that a constitutional deprivation should be material to the extent that it can be demonstrated and the extent of that deprivation is measurable. Therefore this contention is clearly contrary to the operational reality of the new regulatory language (as are similar or duplicative contentions made elsewhere by other commenters).

Finally, reference to lower level decisions is restricted only to the appeal process. The CDCR Form 22 is not part of the appeal process and acts merely to document an action or decision. As such, it does not constitute a level of review.

3084.6 Cancellation Criteria

RE: Subsection (c)(2): Being vigilant, I note when something mysteriously fails to be delivered and so the matter is appealed. Then, 45-60 days later, the same mysterious disappearance occurs and a new 602 is submitted regarding the 2nd, 3rd, 4th or 5th instance and an appeals

SUMMARIES AND RESPONSES TO ORAL AND WRITTEN COMMENTS

coordinator says it duplicates a previous appeal. In fact it is the result of a form of continuing harassment and censorship [curtailment] of a prisoner's first amendment right, arbitrarily and capriciously. **[BKB-#8]**

Subsections (c)(3), (5), (6), (8) and (9) seem defective for reasons already cited (violation of constitutionally protected rights, vague and capable of staff misuse, etc.) **[ECRK-#47]**

Subsection (c)(5) is extremely objectionable and should be deleted because it prohibits an inmate from submitting an appeal on behalf of another person. An disabled appellant may be prohibited from filing on his or her own behalf and there is absolutely no justification for this restriction.

[DAM-#10] This language is too broad. The prisoner may not be capable of writing his or here appeal and there is no justification to substantiate why a prisoner cannot file on the behalf of another person. Rewrite to clarify the rationale or leave out entirely. **[C3-#14]**

Subsection (c)(6) should be clarified to not allow cancellation of appeals that are specifically requesting a Departmental Review Board decision concerning adverse effects resulting for policies, decision, conditions etc. which the Board has power to address and resolve where other staff either do not or will not. **[ECRK-#48]**

3084.6 and subsections (c)(3) must be modified to provide a process for a prisoner to challenge a decision to reject a 602 appeal. The rules are vague with regard to how a prisoner who disagrees with the rejection of an appeal under subsection (b) can, if at all, challenge that decision by providing additional information to the appeals coordinator. (c)(3) seems to implicitly suggest a prisoner write an explanation if "section B" of the 602 form, but this is entirely ambiguous. Besides, "section B" is the "action requested" portion of the form, and as such may already be completed used by the prisoner wishing to explain why a rejection decision is erroneous. The rules should permit a prisoner to attach a page explaining why she or she believes the rejection decision is contrary to the rules. **[SF-#6]**

RE: Subsection (c)(8): What about when a reviewer tries to force a person to do something that no regulation or law requires and this is used as an excuse to say that the prisoner refused to cooperate? What is the method of establishing sufficient basis toward the issue, as in the case of say a catholic/protestant reviewer having a hostility or animus toward a particular muslim or an issue relating to all Islam? Is a prisoner allowed to ask a reviewer what his or her belief system is? If not, hasn't the appellant thus been [covertly discriminated against]? **[BKB-#9]**

The 602 form indicates waiving an interview is a right. However, if an "appellant refuses to be interviewed, the appeal may be cancelled under (c)(8). If one has a right to be interviewed, one also has a right to not exercise that right—contrary to (c)(8). Then 3084.7(e)(1) states that a "face-to-face interview shall be conducted" and goes on to state that even if the appellant waives the interview prison officials may conduct an interview anyway. 3084.7(e)(1) does not, however, refer to or warn the prisoner that the appeal can be cancelled if he/she waives the interview in the box on the Form 602. One can describe this as a trap. Waive the interview and the appeal will be cancelled—without warning and contrary to the prisoner's right to an interview and concomitant right to refuse or waive an interview. **[DF-#7]**

Subsection (c)(8) should be clarified to accurately reflect that appeals staff are not the "reviewer" of inmates' appeals when they are merely performing the duties of screening and managing set forth in 3084.5. Rather, they are only the screener of such appeals in accordance with the separate and distinct definitions of "review" and "screening" currently appearing in the Definitions section (Section 3000). **[ECRK-#49]**

(c)(8)(A) should require some degree of factual specificity as to what an inmate or parolee did or not do that demonstrate alleged refusal to be interviewed or cooperate with a reviewer. Absent such requirement, staff can simply write "appellant refused," irrespective completely of whether an appellant truly did, and there is nothing the offender can do to dispute such allegation, particularly because of its lack of factual specificity. **[ECRK-#50]**

Subsection (c)(10) is objectionable because rejections in response to appeals at the various levels are not always promptly delivered to the appellant. Accordingly, the provision that an inmate must return a rejected appeal "within 30 calendar days of the rejection" should be modified to provide that the inmate may resubmit a rejected appeal "within 30 days of the date on which the inmate received the rejection. **[DAM-#11]** Highly objectionable as written. The timeframe should not begin until the prisoner has received the 602. This section is open to staff misconduct, whereby personnel could intentionally cause a 602 to disappear until it is too late for the prisoner

SUMMARIES AND RESPONSES TO ORAL AND WRITTEN COMMENTS

to do anything about it. It should be changed to read: “...within 30 days of the date the prisoner received the rejection.” [C3-#15]

Subsection (c)(11) is objectionable because restricting an appeal to that which “has been resolved at the previous level” is potentially ambiguous. The appeal may be “resolved” to the *institution’s satisfaction*, but not to the *appellant’s*, which should be the determining factor. Accordingly, this subsection should not be adopted as written. [DAM-#12] Highly objectionable as written. It is ambiguous and makes not sense. Just because the grievance was resolved at a prior level does not mean it is to the prisoner’s satisfaction. This section should be removed, as the reason an appeal is filed is because the previous level decision was not satisfactory to the prisoner. [C3-#16]

RESPONSE: For refutation of the contention that rejection and cancellation criteria amount to a grant of excessive power to coordinators see response immediately preceding. Likewise, excessively expansive claims of constitutional right “infringement” on the part of commenters, rejection of all blanket accusations of supposedly intentional staff abuse and overcoming “limitations” in form space have all been discussed elsewhere on preceding pages.

- Objection is made to screening rules on the grounds that they are overbroad and subjective. A commenter even goes so far as to use the term “capricious”. This is curious since these rules are intended to provide greater clarity and specificity, the very opposite of the complaint.
- Writers then object to language that prohibits inmates from filing on behalf of another noting that inmates with disabilities may need assistance. The regulations are quite clear that inmates with disabilities are to receive assistance from staff. In a prison environment no inmate is allowed power over another nor does the institution encourage the sharing of information that could create safety concerns. Allowing inmates to craft an appeal on behalf of other inmates invites coercion, manipulation and undue involvement with another inmate’s personal affairs, as has been previously stressed.
- The objection to the fact that a DRB decision cannot be appealed misses the point entirely, since that is itself a Secretary’s Level decision. It acts in lieu of a Third Level Decision and exhausts administrative remedies on the issue.
- There is much discussion regarding how an inmate can challenge a screening decision which ignores the fact that if all else fails, ultimately they can appeal it.

Other objections border on the openly disingenuous or deliberately trivial. As such, they lend credence to the suspicion that some commenters may be intentionally abusive of the APA public comment opportunity. Since thwarting rule adoption appears to be their goal, they believe this can be accomplished on basis of objection volume, and throwing in the nonsensical works toward that end. Some of the more obvious examples specific (but hardly limited) to this section follow:

- The argument that someone could sign the box indicating they don’t want an interview, only to see their appeal cancelled is a blatant distortion. It is true that signing the box only expresses the appellant’s desire and if called for an interview they must still appear. But the box itself as no bearing on that rule which remains unchanged from what it was previously. (Also see discussion, page 52).
- A different commenter thinks it reasonable to demand the means to challenge belief systems held by reviewers to prevent the possibility of covert discrimination, as if to do so would not be a gross infringement, irrelevant or infeasible.
- Despite plain and explicit explanation on ISOR page 4 that the “reviewer” definition in the rules has been removed, text additions to eliminate the nonexistent contradiction between this and another—at best remotely related—Section 3000 definition is, nevertheless, still insisted upon.
- A defense to refusing to cooperate would be appellant evidence of a bias on the part of staff involved in evaluating the merits of the appeal. However, it is current practice to require institutions to state the reason why someone is deemed to have not cooperated, directly contrary to what is stated by the commenter. Moreover, sometimes that determination is overturned at the next level.
- A writer objects to the fact that an appellant has 30 days to return a rejected appeal and states that it should be 30 days from the date they receive it. It is.

SUMMARIES AND RESPONSES TO ORAL AND WRITTEN COMMENTS

- Time frames are tolled due to any circumstance which is beyond the inmate's control including mail and processing delays. Nevertheless, rule amendment is demanded to foreclose the possibility that staff "would cause a 602 to disappear until it is too late to do anything about it." Already, all staff misconduct has been directly addressed in 3084(g) and 3084.9(i). Why ever would anyone think making rules predicated on purely concocted assumptions about staff, even for the purpose of preventing misconduct, should be given serious consideration?
- Finally a writer asks that language allowing an appeal to be cancelled because the issue is fully resolved, be changed to "resolved to the inmate's satisfaction". In fact the word "resolved" already implies to the appellant's satisfaction unless the appellant is dissatisfied for reasons unrelated to the original appeal. Then plainly they must file a separate appeal on that issue.

For the reasons set forth above, therefore, the Department declines all suggestions for revision in the text already promulgated for this section.

3084.7 Levels of Review

Where the regulation specifies that the 2nd level will be completed prior to filing at the 3rd level, language should clarified to not exclude appeals that have been ignored, erroneously rejected, or otherwise unlawfully obstructed by staff at the institution level, or that were not answered at the 1st or 2nd level prior to the expiration of the established time limit in accordance with federal standards set forth in 28 CFR. [ECRK-#51]

There needs to be some type of mechanism where when a 602 is not answered, nor a extension of time notice given, that the 602 review be then deemed exhausted. Delays in staff answering appeals is a denial of due process as well as a denial of due process access to the courts. [EDC-#4]

RESPONSE: The matter of Code of Federal Regulation applicability has already been addressed beginning on page 19. With respect to the issue raised, appeals that have been rejected are still subject to further consideration at a lower level. Once they are cancelled, the cancellation decision can itself, be appealed. Thus there is no reason to bypass to a higher level for review. On the remaining issue, If an appeal is beyond time constraints it does not automatically become eligible for higher level review since that would bypass the institution entirely.

Interviews [3084.7(e) and (f)]

On the form first page, [and at 3084.7(e)(1)] it says by placing my initials, I waive my right to receive interviews. Our research suggests that when an inmate does that, and if more information is necessary to do justice to answering the 602, staff are saying [to themselves], "Well I got out of that, he doesn't want to talk to me, so I'll just answer it with the information on the form," negating talking to the inmate. Therefore, the 602 is not getting the fully vetted attention it should have. So the box is bad; I don't believe the regulation has changed, but it's bad for the inmate [because] it makes it easier for staff to circumvent answering the 602 more completely.

[CCSO-#6]

CDCR fails to make sure that inmates will get ducated in advance of 602 interviews. [H-#4, EVW-#3]

Historical practice against me for the last 13+ years is random appearance/calls from staff to an interview not allowing sufficient time for the acquisition of facts and/or materials beforehand. [H-#5, EVW-#4]

Amend new subsection 3084.7(e) with the addition of the following text: "...and with his/her CDCR Form 602 being present during the interview to clarify the appeal issue..." Correctional staff have a long track record of showing up for an interview without the presence of the appeal itself. When questioned, staff reply there is no departmental policy that requires the interviewer to have the appeal in their possession when conducting interviews. What good is it to conduct a face-to-face interview to clarify the appeal issue, if the interviewer doesn't have the appeal with them. Making the interviewer bring the appeal with them allows them to have knowledge of the activity of statute under review. [T-#2]

SUMMARIES AND RESPONSES TO ORAL AND WRITTEN COMMENTS

(e) Should specify if the appeal reviewer may delegate the interview, and if so, to which staff. In particular, it should specify that the interview shall not be delegated to staff that participated in the event or decision being appealed. This is necessary to ensure that the staff performing the interview are impartial and do not bias the report of the interview to support their position. As currently written, partiality could be considered acceptable because the “interviewer” is not necessarily the “reviewer” of record as restricted in 3084.7(d)(1). **[SH-#3]**

(f) Should state that when there is a face to face interview or telephone interview, the authority conducting the interview will have either the original 602 form and supporting documents or a copy on hand during the interview. **[C3-#17]**

RESPONSE: The fact that an inmate waives their right to be interviewed does not preclude the reviewer from requesting them (or others, as necessary) to appear at an interview if they need further clarification of the issue. But compelling unwilling participants to appear for an interview is fruitless and under the revised regulations a failure to appear does lead to an automatic cancellation of the appeal. That said, inclusion of a box on the revised Form 602 for appellant use in this regard represents a major improvement over past practice. Previously, interview refusals would lead to automatic cancellation. Now, with the addition of the check box, the option of declining to be interviewed while permitting the appeal to proceed is afforded appellants. Therefore, opposite the claim made by one commenter, the new regulations provides some measure of additional protection for inmates who do not wish to be interviewed, whatever the reason. Beyond this, allegations that coordinators are not prepared for the interview (including being not familiar with or not having access to the appeal in question), fail to properly duce, or do not allow sufficient time for the interview, are unsupported. More importantly, such behaviors and/or practices would be contrary to policy and upon verification of such situations, subject to correction through training and best practice reiteration. Language elsewhere [3084.7(d)] addresses the involvement of staff in the appeal response, who were also involved in the act or decision being appealed. With limited exception due to necessity, there should be no personal conflict of interest implicit in the appeal response and in no instance are individuals party to the appeal to be the final reviewer. For these reasons the Department sees no compelling necessity for changes in text already adopted.

3084.7(g) Group Appeal Interviews

This subsection should specify that the appellant submitting a group appeal, or current lead appellant shall be one of the inmates interviewed. This is necessary because group appeals are usually submitted by the inmate most familiar with the issue being appealed and able to clarify it, and the list of additional appellants is often sorted with the inmate most competent to take over the appeal listed first. This would be similar to instances of multiple appeals and it may be appropriate to locate both subsections in the same section. **[SH-#4]**

RESPONSE: While it is entirely likely that the order of appellant appearance on the 602-G may be significant with respect to the degree of familiarity with the issue in question, because of the difficulty involved in ensuring that this will occur, a requirement for such has not been established. Accordingly, this text allows flexibility on the basis of the wording “one or more” participants. Logically, this would include not only the lead appellant, but also as many other individuals as needed to be interviewed for issue clarification, with the order of appearance no doubt a clue as to who will be interviewed. Whether this provision should be located in the interview as opposed to the preparation and submittal subsection of these rules is a coin toss. Because relocation is not a necessity, the suggestion is declined.

3084.7(h) Responses

All responses to appeals by staff should be limited to no more than just one or two pages, with the exception of the third level, which should not be limited. **[ECRK-#27]**
Include language requiring staff to indicate at Sections C, E and G on the Form 602 whether an appeal was either “mailed” or “delivered” to the appellant on the given date. Such distinction is relevant, for intra-prison mail from staff to inmates frequently gets lost, misplaced or otherwise

SUMMARIES AND RESPONSES TO ORAL AND WRITTEN COMMENTS

prevented from reaching inmates in a timely manner. Hence, although an appeal might indeed have been “mailed to appellant” on a certain date, that does not mean the appeal was therefore “delivered to appellant” either on or very soon after the date specified. Accordingly, mandate that staff circle either “mailed/” or “delivered” at the form sections specified. **[ECRK-#53]**

RESPONSE: There is no logical reason to limit First and Second Level appeal responses to one or two pages, unless (as seems likely) the commenter believes doing so would advantage the appellant and disadvantage the Department. While a one or two page response seems reasonable in most instances, individual cases may warrant longer treatment, and this option should not be foreclosed by regulation. Likewise, the suggestion that a “mailed” versus “delivered” distinction be mandated is declined. Nothing prevents appellants from noting when responses are received and bringing up suspicions of delay if doing so is relevant to the matter in question. The suggestion has a strong “gotcha” quality, whereas the actual intent of displaying this information on the form is to ensure the prompt completion of an important processing step and document the fact that a response was dispatched to the appellant. Moreover, for purposes of determining compliance with time frames all appeal are presumed to be mailed and allowance made for the mail processing time in effect at the institution.

3084.8 Time Limits

The time limits delineated are arbitrary and capricious because as a law enforcement agency, CDCR must obey statute of limitations of misdemeanors (1-year) and felonies (3 or 5 years) from incident date. **[H-#2, EVW-#2]**

Under these regulations there is no incentive for staff to adhere to appeal time limits. It has been my experience that staff rarely comply with the response time-frames set forth. I have had appeals take one year to process from initiation to completion at the Director's [3rd] level of review. On the other hand, if inmates exceed response timeframes, the appeal can be screened out and returned without processing. Therefore, as inmates we have an “incentive” to comply or be subject to the punitive ramification of our appeal being dismissed or returned unprocessed. Staff, on the other hand, have no reason to comply and more often than not, do not because of the absence of “punitive” incentive. Additionally, when a staff response is grossly overdue, routinely there is failure to provide the notice of delay [3084.8(e)]. Why should they? There is no punitive action to inspire them to comply. **[TEF-#1]**

It has been hard enough to get 602 appeals answered in a timely manner, as the Appeals Coordinator and staff routinely screen out 602s for invalid reason, then let the same 602s that screen out get logged weeks and weeks later. Also, 602s are “lost,” and/or are not logged when they are received by staff. **[EDC-#1, EDC-#2]**

The inmate is penalized for exceeding the time limits, but Department staff are not penalized in any way if they exceed the time limits. This is patently unfair. **[MH2-#4, WR-#10]**

Regulation fails to include any language entitling appellants to automatically proceed from the first to second level, from second to the third level, and/or from the third level to the courts whenever staff at these levels fail to respond to appeals within the set time limits and fail to provide written notification beforehand of an anticipated delay, the reason(s) therefore, and the expected date of completion. **[ECRK-#54]**

If the Department fails to respond to an appeal within the time limits imposed by regulation, the appeal should be automatically granted by default. This would be the converse of the penalty imposed upon the inmate or parolee for the same failure, which is the dismissal of the appeal. **[WR-#10]**

Where subsection (b) uses the word “must” when referencing the requirement of appeal submission within 30 calendar days, this seems not to be in accord or anticipated by the rules of construction requirements set forth in Section 3000.5. Accordingly, the text of this subsection should be clarified to accurately reflect whether appeals “shall,” “should,” or “may” be submitted within 30 days, whether such time limit is only directive, whether failure to meet such time limit precludes the appeal from being responded to by staff, and whether any administrative grievance procedure remains available to individuals who fail to meet such a time limit. **[ECRK-#56]**

The “event or decision date,” defined in (b)(1) as it relates to formal hearings should be clarified. 3084.9(g)(1) suggests that for disciplinary hearings, it is the hearing or rehearing date. However,

SUMMARIES AND RESPONSES TO ORAL AND WRITTEN COMMENTS

existing practice and the reverse of the CDC-115 states time constraints begin with the receipt of the finalized copy of the form CDC-115. By the same standard, committee hearing appeal time constraints begin with receipt of the finalized CDC-128G, which reflects the final decision of the committee, but this is not explicitly stated anywhere. Change is necessary to clarify the ambiguities. [SH-#5]

(c)(4) Language should be added to read: "...state of emergencies, official and unofficial modified programs which require the postponed of nonessential administrative decisions and actions..." This protects prisoners who are currently being subjected to numerous modified programs because of staffing shortages and budgetary restrictions. [C3-#18]

Add a new exception to the time limit subsection to read: "Staff intentional or unintentional mishandling of the grievance or misconduct during the process. If this provision is not added, then there should be a statement everywhere the appeal timeframe is mentioned that states: "prisoners shall not be held accountable for staff's mishandling or misrouting of mail. [C3-#19]

(e) Should be changed to remove the phrase: "except for the 3rd level." The phrase renders 3084.8(c)(3) meaningless, by allowing time limits to be extended infinitely without notice. The change is necessary to provide accountability in the third level review process, while still allowing response time limits to be exceeded in exceptional circumstances. [SH-#7]

RESPONSE: Complaints that appeal responses are not always timely is the basis for many of the changes to the regulations. By creating efficiencies and implementing a new process for obtaining desired items, services or contacts (as explained on ISOR pages 2-3 and 16-17), the Inmate Appeals Branch has sought to relieve the pressure on local level appeals offices so that they can give more time to appeal responses and meet time constraints.

- The reason the new regulations do not allow an appeal to bypass a level when time constraints are not met (a request for regulatory change which has also been previously denied when posed as a petition under the provisions of the APA) is that one of the fundamental purposes of the appeal process is to provide for a review by the current housing authority. Bypassing any level means not only that either a facility or an institution will not provide needed input, but that the next level of review has no way to determine whether the previous level understands policy with respect to the issue.
- The fact that appeal must be submitted within 30 days is directive and late appeals will be cancelled. While this ends the appellant's involvement with the appeals process it does not preclude the institution from taking administrative action as needed to resolve an issue. The 30 day time limit begins with the date of the event, act or decision being appealed, not the date of documentation unless the documentation is the first notice the offender has of the issue. However, appellants are not required to wait for needed documentation. They can submit their appeal which will be screened back to them and time constraints tolled for 30 days to allow them to acquire needed documentation.
- Verification of behaviors and/or practices by coordinators or their staff contrary to policy are subject to correction through training and best practice reiteration. Also, rejection of all blanket accusations of supposedly intentional staff abuse has been discussed elsewhere in this document on preceding pages.
- As the appeals process exists outside of those codes specific to determining criminal severity, the statute of limitations cited have no relevance to the matter of appeal time limits.
- Use of the word "must" in Subsection (b) does not constitute a meaningful flaw in construction in as much as preceding and subsequent text of this article makes clear the fact that appeal submission has to occur within the time frames specified. Since the filing of an appeal is discretionary, use of the word "shall" would clearly be inappropriate. Failure to submit within the specified time frame is cause for cancellation under 3084.6(c)(4) and forecloses any other grievance option unless the exceptional circumstance clause applies.
- Any time frame discrepancies between this section and forms outside the Appeal Form series or Written Request process will be remedied in the manner described on page 20, above.
- Requested language extending time constraints due to staff mishandling of the appeal itself, or the mail process, would be redundant. Offenders are not responsible for missing time constraints for reasons beyond their control.

SUMMARIES AND RESPONSES TO ORAL AND WRITTEN COMMENTS

It is worth repeating for added emphasis that while it is the goal of the Department to respond to every inmate appeal, at every level in a timely manner, to consider an appeal denied because staff fails to meet time constraints would defeat the purpose of the appeals system. The appeals process was established to enable staff to resolve inmate/parolee issues at the lowest possible level. There are sometimes justified reasons for delays in responding to inmate/parolee appeals and to deem a late response an automatic denial, as requested, would only create an additional and unnecessary burden upon the next level in the appeals system or the courts. If the inmate's problem can actually be resolved at the lower level, albeit in an untimely manner, such an outcome is preferable to elevating the matter to an appeal at the next higher level.

Emergency Appeals [3084.9(a)]

The Department cannot comply with the current regulations and the fact that it does not follow its own existing published policy puts inmates at increased risk. **[MH2-#6]**

Language of (a)(1) should clarify, and even emphasize, that the "risk of" such injury or harm is the determining factor for emergency processing, and that the phrase "would subject" refers solely to the "risk of" such injury or harm and not to the injury/harm language itself **[ECRK-#57]**

3084.9(a)(1) lists only two circumstances that can warrant emergency processing. Such listing should be broadened [clarified to encompass] certain less-clear circumstances that also can warrant emergency processing, for example including:

- Imminent threat of serious or irreparable injury or harm to an inmate's or parolee's mental health or safety;
- When an approaching legal deadline less than 30 days away which the appellant has been or is presently being prevented from working on or meeting due to events or circumstance over which only staff have control, as cited case law dictates;
- When staff are threatening the status quo of the parties in pending litigation by acting to transfer the inmate to another prison or otherwise taking retaliatory action(s) against him or her because of such litigation, as cited case law dictates; and
- When an inmate is otherwise being treated by staff in violation of constitutional rights, as cited case law dictates. **[ECRK-#58]**

Delete any (a)(3) language which seems to indicate that appeal coordinators may substantively review appeals submitted for emergency processing and thereupon unilaterally decide to grant or deny such processing on the basis thereof. **[ECRK-#59]**

In (a)(3) mandate reasoned explanations as to how or why the circumstances described in appeals are not such that regular appeal time limits subject appellant offenders to a substantial risk of personal injury or other serious and irreparable harm. Such mandate would help deter the common practice of appeals staff in arbitrarily and capriciously denying emergency processing of appeals that in fact actually do meet the stated criterion for such processing. **[ECRK-#60]**

RESPONSE: Although language regarding what is considered an "emergency" has been broadened in the new regulations, it intentionally does not attempt to cover all the areas (so-called "less-clear" circumstances) raised by commenters. In some instances, despite the issues' importance or preeminence in the mind of the individual in question, an immediate response may not in fact be needed. The Department feels the text as adopted establishes sufficient guidance for coordinators to use best judgment in determining when to accept and refer such matters on to the Third Level. Any suggestion that this language overly or inappropriately empowers coordinators to "unilaterally decide" is not accepted as valid. There must be a point of intake at the local level and any other option, such requiring "substantive" review to be done only at the Third Level, would be unworkable. It would clearly foreclose the involvement of those most familiar with and able to assess the actual urgency of the issue in question and the necessity for lower level review has been emphasized in the response immediately preceding. That appellants would disagree with coordinator denial of an emergency appeal is perfectly understandable, but the fact of denial does not necessarily prove arbitrariness or capriciousness despite claims otherwise. Nevertheless, cancellation of an emergency appeal can be appealed to the Third Level pursuant to 3084.6(e). Furthermore, 3084.6(a)(4) gives an appeal coordinator discretion to waive the regulations based upon a determination that a failure to do so could result in significant harm and that the appellant would otherwise be denied remedy. Finally, verification of behaviors

SUMMARIES AND RESPONSES TO ORAL AND WRITTEN COMMENTS

and/or practices by coordinators or their staff contrary to policy are subject to correction through training and best practice reiteration. Also, rejection of all blanket accusations of supposedly intentional staff abuse has been discussed elsewhere in this document on preceding pages. Accordingly, the Department sees no compelling necessity for changing text already adopted.

Property [3084.9(f)]

Rogue staff have a practice of taking things that they then give to other prisoners as reward for information or to intimidate another prisoner. This makes the refusal to accept repair, replacement or substitution of like time and value provision a joke. Consequently, I believe it fair that a prisoner refuse any substitute that cannot be factually shown to have been donated...otherwise, the practice is nothing more than perpetuation of crime. **[BKB-#10]**

The ISOR misrepresents the requirements of Gov't Code (GC) 965. CDCR property claim appellants are being required to discharge the state from further liability in writing, while the law actually states that "the board may require...forms for liability discharge. **[KDS-#10]**

RE: (f)(4), (f)(5) and 3193(b). If I or my husband have paid for something, it is not acceptable [that] the Department is not held responsible for the loss or damage, and that an item will be "substituted" from "donated property" at no cost to the state. I am appalled and want this stricken from policy. I want the policy to reflect the same level of accountability to which a prisoner is held (the ultimate accountability for a prisoner is incarceration). I find subsection (4) extremely offensive. I expect any item lost or damaged by Department staff to be replaced with a new, like or a comparable item, period. The state or the person who caused the loss or destruction should be held accountable for the loss and should pay for it. **[C3-#20]**

RESPONSE: Certainly, instances of staff misconduct involving inmate property may occur. On the other hand, to intimate that the long-standing substitution of like value practice for damaged property is "consequently a joke" is beyond the Department's responsibility to respond. The basis of the comment is an opinion, and openly expressed as such.

Contrary to a commenter assertion made on the basis of an edited citation, GC 965 does necessitate that the Department obtain a written liability discharge prior to payment of monetary claims. The relevant passage, **unedited**, reads: "Upon the allowance by the Victim Compensation and Government Claims Board of all or part of a claim for which the Director of Finance certifies that a sufficient appropriation for the payment of the claim exists, and the execution and presentation of documents the board may require which discharge the state of all liability under the claim, the board shall designate the fund from which the claim is to be paid and the state agency concerned shall pay the claim from that fund." Plainly, CDCR cannot pay claims absent the execution and presentation of the discharge from liability document required by the Board.

Finally, statements of dismay, outrage and demands for policy to be stricken notwithstanding, changes in property replacement practices are not within the scope of this regulatory revision. The governing provisions are located in §3193 and are not a part of NCR #11-02 (with the exception of preventing orphaned cross-references, per ISOR, page. 4). Under the provisions of 3193, monetary compensation for losses is authorized if donated items of equal value are not on hand. There is no provision for replacement with "new" items, or for employees to "pay" for losses. The circumstances giving rise to property loss claims are frequently complex and open to dispute with respect to responsibility. Likewise, such incidents almost without exception occur in the course of performing employment duties and numerous objections to holding employees "accountable" in the manner demanded exist from the perspective of employment, collective bargaining and similar workplace policies.

Staff Complaints [3084.9(i)]

If peace officer/staff misconduct can be grounds for employment termination because of criminal acts while employed, staff should not be able to get away with criminal behavior because inmates could only "602" so many things in so much time allowed. **[H-#3]**

The 602 process should not be the only process to seek an Internal Affairs investigation per 3084.5(b)(4)(C). When a prisoner claims to be a victim of a crime committed by CDCR staff, it is

SUMMARIES AND RESPONSES TO ORAL AND WRITTEN COMMENTS

not the business of building correctional officers or the appeals coordinator to gather facts and forward them to a district attorney. Staff misconduct should also be considered a 3084.9 "Exception" so as to not allow other prior 602's preventing misconduct investigation. **[H-#7, EVW-#6]**

Strenuously object to the entire regulation concerning staff complaint screening. This mechanism was previously declared an underground regulation. This unconstitutional screening has been practice for many years but was kept underground because it is in clear contravention of PC 832.5 and 148.6, [whereby it is] the right of every citizen to file a misconduct complaint against a peace officer. The law further declares you have a right to have the complaint investigated if you believe an officer acted improperly. The regulation deprives inmates/parolees of that statutory right, in violation of the state constitutional provision that prohibits any agency from declaring statute unenforceable. OAL must reject this provision in its entirety. **[SD & KB-#11]**

This rule purports to do away with "citizens' complaints," authorized by PC 832.5 and CDCR lacks the authority to do so. **[LB-#9]**

The rules reference a "confidential inquiry in response to a staff complaint. Extending "confidential" status to non-peace officer employees improperly expands the scope of PC 832.5 and probably violates the Public Records Act. **[LB-#11]**

Unconstitutionality notwithstanding, the rule also leaves gaps in the inmate ability to seek redress against staff for certain grievances, including minor or non-material staff misconduct. Example: Staff member verbally disrespects an inmate. Since this harm is non-material and falls into the "emotional-spiritual" category as opposed to "tangible important" or relevant material adverse effect, this type of behavior cannot be brought in regular appeal form. It would have to be brought as a staff misconduct complaint. Under the three provided referral avenues, the only option would be a confidential inquiry by the hiring authority. In 99% of all cases it will not be done. Avoidance of the PC misconduct complaint and investigation mandates was the impetus behind the underground regulation upon which the staff complaint regulation is based. Inquiry creates a record kept for at least five years. For this reason it is asserted that the option will not be followed in staff disrespect to inmates' cases, or any other incident of staff misbehavior deemed non-material or minor by the screener. This gives staff essentially a "good faith" free ride on any untoward conduct that does not rise to the level of a misdemeanor or felony. They will receive this "free ride" on unprofessional conduct despite section 3391's prohibition of derogatory language directed toward inmates. It goes without saying that referral to IAB for investigation will not occur for "disrespect" offenses. This question of disrespect is asserted because it is a common occurrence at the ground level point of interaction between inmates and staff. This gap will eliminate one of the stabilizing aspect of the appeals system: venting. **[SD & KB-#12]**

Subsection (i)(1) refers to staff complaint categorization by the hiring authority but fails to reference any relevant standards that apply thereto. **[LB-#10]**

Rarely have I been able to get the department to accept an appeal as a Staff Complaint (as 3084(g) defines). The appeal system is used to systemically decrease the quantity and amount of documentation of misconduct. **[DF-#8]**

There should be a 24-7 phone line where [staff complaint] 602's can be logged and registered. You need to be able to fire, remove, [and] control your CO's and administrators. **[JPF-#3]**

RESPONSE: As has been often mentioned in this document, verification of behaviors and/or practices by coordinators or their staff contrary to policy are subject to correction through training and best practice reiteration. In aggrieved and proven instances, possible disciplinary action already includes (but are by no means limited to) firing, reassignment or formal letters of instruction, wholly consistent with the commenter request. That said, not all that is objectionable in the minds of commenters rise to the level of criminal misbehavior and to assert, however indirectly, that it's only fair to allow unlimited 602s as some measure of compensation for appellants is but another example of the kind of off-kilter input the APA public comment requirement attracts when it's about correctional rules. Likewise is the notion that it is "not the business" of local staff to be involved in fact finding about offender claims of criminal misconduct. Any other option would be prohibitively expensive, cumbersome and grounded in the unacceptable and wholly unproven proposition that public employees are untrustworthy and dishonest (that's not to deny the fact of illegal employee acts, on occasion, by certain miscreant

SUMMARIES AND RESPONSES TO ORAL AND WRITTEN COMMENTS

individuals). The rule in question is already classified as an exception to the regular rules, so the commenter request to do this is unclear, unless what is implied is a process outside the appeal system entirely. This option is beyond the capacity of the Department to establish, and besides, that's what recourse to the judicial system can accomplish and for which purpose it exists.

Additionally:

- Actually there is no limit on the number of staff complaints that can be submitted and which will be reviewed . The limit only applies to the number that will be accepted and given a log number within the time period of 14 days. Moreover, no staff complaint counts towards establishing abuse unless it is clear that the inmate is falsely designating regular appeals as staff complaints. Furthermore, contrary to what is alleged, a Form 602 is not required for filing an allegation of misconduct which can be reported either verbally (in person or by phone) or in writing. Therefore any allegation that this limit can be used to cover staff misconduct would be misleading.
- Also, any system for reporting abuse must be able to anticipate intentionally false and irresponsible allegations, such as those the suggested 24-7 hot line would be especially prone to attracting.

With respect to comments specific to peace officer complaints and confidentiality, a number of entirely unfounded assumptions have been made.

- Firstly, the assertion that the Staff Complaint process was previously declared an underground regulation due to unconstitutionality is contrary to what that determination was actually all about. The reason for the finding that the policy constituted an underground regulation was a failure to have it approved as a rule by the OAL within statutory time frames. These regulations have corrected that (ISOR pages 1 & 15).
- Likewise, the assertion that the rule does way with citizen's complaints is also incorrect, and in fact a key flaw has been corrected. Complaints lodged about departmental peace officers from members of the at-large public will be processed in accordance with the cited penal code provisions. As has been correctly observed, the Department has no authority to change this statutory process, created by the Legislature and intended for application principally in the context of interactions between local law enforcement and the general public. On the other hand, Subsection 3084.9(i) remedies lack of clarity previously with respect to complaints by incarcerated individuals under Department custody, against peace officers and non-peace officers alike. The rule now unquestionably extends the principles set forth elsewhere to the specific setting of state prisons, in a workable manner, in place of the incomplete and wholly inadequate text of superseded 3084.1(e). Moreover, in accordance with newly adopted 3084.9(i)(4), the appeal response to a staff complaint shall inform the appellant of the status and outcomes of investigations, consistent with any such parallel statutory expectation.
- The assertion that "confidential" status has been illegally extended to non-peace officer employees is equally misplaced. Aside from the cited penal code section, all employees (irrespective of peace officer status) enjoy, under a plethora of employment, collective bargaining, human resource and personnel laws, policies and best practice standards, the right of confidentiality in a wide range of job-associated matters. Special attention to the privacy of the employee applies when matters which may result in disciplinary action arise, such as those associated with allegations of staff misconduct, above and aside from any public records act requirement. To assume otherwise also betrays a mistaken notion of the principles reflected in this rule, the exclusive basis of which is not the penal code section referenced, as incorrectly supposed.
- The complaint that allegations of disrespect, minor and/or non-material staff misconduct will result in a free ride and destabilize the "venting" function of the appeals system, demands closer scrutiny and challenge. ISOR pages 2, 3 and this document elsewhere stresses that system overload in a time of fiscal constraint brings with it (contrary to everyone's interest) the risk of breakdown and dysfunction, aside from constituting a failure to satisfy critical legal expectations. So, it is pure and simple obliviousness to assert that aside from being the means of resolving substantial and real concerns and needs, the appeal process should also perform a venting functions, which must be somehow preserved. To the contrary, the Department hopes that the changes implemented, together with the Written Request process

SUMMARIES AND RESPONSES TO ORAL AND WRITTEN COMMENTS

will result in a significant decrease in the use of appeals to vent, as this is a function which the appeals system is not intended to serve, and organizationally should not be emphasized.

- The final objection that the Department does not always process an appeal as a staff complaint even though the person submitting it, designates it as such, is consistent with Department policy. The determination of whether or not an appeal is a staff complaint is based upon whether the conduct alleged is contrary to the law, the regulations, policies or prevailing professional standards. Since the determination to process an appeal alleging misconduct means that it will be reviewed confidentially, the improper treatment of appeals raising issues that don't require such confidentiality is counterproductive of the goals of the appeals process.

ADA

Exactly what is the procedure to appeal ADA issues? CDCR 602-H? **[H-#13, EVW-#10]**

My son is confused about the changes in the CDC-1845. Is it no longer being used? If it is not, then what are the ADA recognized inmates supplied to use? **[MH-#2]**

Inmates are confused as to what they need to do to file an ADA complaint since it appears that the 1845 form has been eliminated. **[MH2-#9]**

The new regulations do not address the issue of the American with Disabilities Act, other than to state compliance is currently under Federal court supervision. The rules provide no guidance as how to proceed with an ADA issues, and some guidance should be provided. **[WR-#11]**

Repeal of Section 3085 will objectionably allow staff to arbitrarily and capriciously mishandle and obstruct disability accommodation requests and discrimination complaints without any regulatory oversight whatsoever. Under state and federal law, Departmental employees are required to follow, adhere to and otherwise comply with and not contravene or violate established regulations. Moreover, offender appellants can bring certain actions in court to correct noncompliance by staff with regulations. Conversely, a remedial plan does not create any substantive rights that prisoners can have enforced through such traditional means. Accordingly, this sections should not be repealed, but rather should be amended and refined along with the Department's entire inmate grievance procedure so as to correct its many flaws and deficiencies that long have been and still are preventing many appellant offenders from the rights, protections, guarantees and relief that the ADA and the Armstrong Remedial Plan were intended to provide. **[ECRK-#61]**

Where the explanation at current 3085 states appeal rights are carried out per the ARP, such language seems incomprehensible, misleading and seemingly inaccurate in its present form. Although the Department might very well indeed have an ADA-related appeal procedure pursuant to the ARP, the Department cannot truthfully say that such procedure is followed, adhere to and otherwise complied with and not contravened for violated by Department staff "in accordance with" the ARP. **[ECRK-#62]**

RESPONSE: ADA appeal issues are addressed in accordance with the Armstrong Remedial Plan (ARP) [see ISOR pgs. 15 and 16]. Under the process established by the court of jurisdiction, the Department developed the CDC Form 1845 (Rev. 01/04), Disability Placement Program Verification, to identify inmates that required special placement in the Disability Placement Program (DPP)—designated prisons and reception centers. The following recapitulates written guidance provided in the ARP:

The Disability Placement Program (DPP) is the Department's set of plans, policies, and procedures to assure nondiscrimination against inmates/parolees with disabilities. The DPP applies to all of the Department's institutions/facilities, all programs that the Department provides or operates, and to all inmates who have disabilities that affect a major life activity whether or not the disabilities impact placement. Although the program covers all inmates/parolees with disabilities, whether or not they require special placement or other accommodation, it is facilitated in part through "clustering" or designating accessible sites (designated facilities) for qualified inmates requiring special placement. Inmates with permanent mobility, hearing, vision, and speech impairments, or other disability or compound conditions severe enough to require special housing and programming, are assigned to special placement in a designated DPP facility. Inmates with a permanent impairment of lesser severity, learning disability, or a kidney disability,

SUMMARIES AND RESPONSES TO ORAL AND WRITTEN COMMENTS

may be assigned to any of the Department's institutions/facilities (designated DPP institutions or non-designated DPP institutions) consistent with existing case factors.

It is the mutual responsibility of the inmate/parolee and the Department to verify disabilities that might affect their placement in the prison system, and of verifying credible claims of disability in response to requests for accommodation or complaints about disability-based discrimination. The Department is not required to automatically screen all inmates/parolees to identify disabilities. Inmates/parolees must cooperate with staff in the staff's efforts to obtain documents or other information necessary to verify a disability.

Verification may be triggered by any of the following: (1) The inmate/parolee self-identifies or claims to have a disability (see also 1824 process below); (2) Staff observe what appears to be a disability severe enough to impact placement, affect program access, or present a safety or security concern; (3) The inmate/parolee's health care or central file contains documentation of a disability; (4) A third party (such as a family member) requests an evaluation of the inmate/parolee for an alleged disability.

Verification of a disability that may impact placement shall be recorded on the Form 1845. Once completed and approved, the Form 1845 becomes part of the inmate's or parolee's file and is effective until a change in the inmate's or parolee's condition causes it to be canceled or superseded. Identification of disabilities affecting placement shall usually occur during Reception Center processing. Additionally, a staff member shall refer the inmate/parolee for verification of the disability. The referral is made by directing a standard CDC Form 128B, Chrono-General, to the institution/facility's health care services. Health care staff verifies the disability using a Form 1845 with appropriate CDC Form 128C documentation listing the inmate's limitations. Responsibility for completion of medical documentation portions of the form rests with institution/facility health care services licensed clinical staff.

Furthermore, an inmate/parolee with a disability may request an accommodation, to access programs, services, activities or grieve alleged discrimination, through the CDCR Form 1824 (Rev. 10/06) process. This form is readily available and Departmental staff are required to provide assistance to all disabled inmates/parolees who require assistance in its use. The inmate/parolee may submit the request to the local Appeals Coordinator. Any relevant documentation of disability that is in the inmate's/parolee's possession or is easily obtainable by the inmate/parolee should be attached. When an inmate/parolee files an accommodation or modification appeal on an inappropriate form, i.e., CDCR Form 602, the Appeals Coordinator attaches a CDCR Form 1824 and processes the appeal according to specified timelines.

It is also the mutual responsibility of the inmate/parolee and the Department to verify a disability when an accommodation request (appeal) is made. The inmates/parolees must cooperate with staff's efforts to obtain documents or other information necessary to verify the claimed disability. Upon date of receipt, the Appeals Coordinator shall review the CDCR Form 1824 to determine whether the appeal meets one or more the following guidelines: (1) An issue covered in the Armstrong Remedial Plan. (2) Allegation of discrimination on the basis of a disability under the ADA.. (3) A request for access to a program, service, or activity based on a disability. (4) The appeal includes both ADA and non-ADA issues (ADA issues will be responded to first). In such instances, the appellant will be advised he/she may file a Form 602 to appeal the non-ADA issue. (5) The appeal concerns an issue that substantially limits a major life activity.

If the Appeals Coordinator determines that the appeal meets the above criteria, it will be assigned to the appropriate Division Head for review and response. If the inmate/parolee fails to provide documentation to verify a disability and specifically states that he/she does not have any relevant documentation in their possession and/or specifically states there is no relevant documentation contained in their files (central/medical/ education) and the request otherwise meets the eligibility criteria of the Appeals article, the coordinator shall accept and log the appeal and assign it to the appropriate Division Head for the first level review. Otherwise, the appeal shall be returned to the inmate with instructions to attach required documentation.

If the Appeals Coordinator determines that the appeal is not an ADA issue it is "re" categorized appropriately and processed as a CDCR Form 602 according to the provisions of the Appeals article. Remaining ARP topics include medical and non-medical verification of the claims contained on the Form 1824, time frames for response, expedited processing, and accommodation while on parole. Furthermore, the document in question unequivocally upholds

SUMMARIES AND RESPONSES TO ORAL AND WRITTEN COMMENTS

the continuing applicability of other provisions of the Department's rules (appeals article) pertaining to inmate/parolee appeals not addressed in the ARP. Finally, the ARP is a Court ordered document. If any ARP provision conflicts with the California Code of Regulations, DOM, institutional operational procedures, or institutional policy, the ARP is the controlling authority. The ARP (as amended) addresses all aspects of the DPP and is binding upon the Department and its' employees.

The following responses are derived from the foregoing:

- CDCR Form 1824 continues to be used, under the authority of the ARP, for modification or accommodation requests. Since the 1/95 form was revised (in 2006) and Section 3085 is being deleted, the obsolete (1/95) version appearing in the official version of the relevant regulations is lined-out as depicted in NCR #11-02. Obviously some have misinterpreted the technique of line-out to mean that the current form has been discontinued entirely. This is not the case. The obsolete version only has been eliminated. Furthermore, the process of DPP verification set forth in the ARP, (and outside the scope of the changes set forth in NCR #11-02), affords those eligible the protections accorded by the Americans with Disabilities Act, entirely separate and beyond the self-initiated reasonable modification or accommodation request form and the significantly outdated provisions that had been set forth in 3085.
- It is not necessary to address the ADA in these rules, because the ARP governs departmental practice regarding this matter. The requested guidance is provided in the ARP, copies of which are available in libraries or parole offices for viewing.
- Department staff have been instructed that the ARP is binding. Moreover, as pointed out above, the ARP process does not wholly supersede the Appeals article. Claims of noncompliance with its provisions can be the basis of either a regular, medical, staff or (depending on circumstances) emergency appeal. Beyond exhaustion of administrative remedies, pleas for plan correction and/or remedy probably should be directed to the court of jurisdiction for possible relief. This type of non-conventional means is necessary thanks to past judicial intervention and any continuing acceptance of jurisdiction the court may wish to exercise. Claims of staff abuse or other such "contravention" allegations, upon administrative remedy exhaustion, would probably be best directed in likewise manner.

Health Care Appeals

The new regulations should explicitly specify that new provisions, such as the 602-A requirement, do not apply when filing a health care appeal. Although the ISOR clearly states that health care appeals are not addressed, because health care appeals are being rejected for failure to comply with the new regulations, there is some necessity for amendment. [SH-#10]

RESPONSE: In 2001, a federal class-action lawsuit alleged that the dire state of medical care in California state prisons violated the 8th amendment of the U.S. Constitution, which prohibits cruel and unusual punishment. In 2002, the State settled the lawsuit by agreeing to reform the system. However, after several years the court deemed it necessary to remove control of prison medical care from the State and appointed a federal Receiver to oversee the reform process. The receiver's job is to bring the level of medical care in California prisons to a standard which no longer violates the U.S. Constitution. Once that goal is accomplished and sustainability is ensured, the court will return control of prison medical care to the State and the Receivership will end.

The Receiver is responsible for: (1) Providing health care to 166,000 inmates. (2) Delivering health care at 33 adult institutions in California. (3) Overseeing California prison health care positions, including the doctors, nurses, pharmacists, and administrative staff encompassed in the California Prison Health Care Services (CPHCS). Accordingly, as an organizationally separate and independent entity under Federal court supervision, the CPHCS cannot be compelled to follow the appeals process set forth by the Department. Recognition of this is enshrined in the provisions of 3084.1.

Written Request Process & Form 22

SUMMARIES AND RESPONSES TO ORAL AND WRITTEN COMMENTS

While touted as a way to reduce 602s, introduction of the Form 22 actually introduces a whole new form and a new system, which will take additional staff time to respond to. The one CDCR Form 22 I know of being filed thus far was never answered, so this systems appears suspect, at least at the outset. **[JLT-#7]**

The Form 22 is not being supplied to the individual buildings. Consequently, inmates are "602ing" certain issues, without first submitted the Form 22 and the Appeal Coordinators are rejected the 602s under the guise that the appellant hasn't first submitted a Form 22 in order to satisfy the supporting document requirement. Appellants can't submit what they can't obtain.

[PC-#1]

Economizing doesn't appear to extend to the notion of adopting new multiple page forms. **[SM-#4]**

The appeals coordinator claims this new process is meant to make staff more accountable, [...but ...] I personally don't see any accountability here. **[PC-#5]**

I fail to see how this informal/formal process...is valid when any staff can and will use the "I am too busy to respond" loophole to avoid doing so. All staff members doing their assigned duties should be busy doing so, and unless responding to a Form 22 is not made a part of their post orders, they will use this loophole to doing so. **[SA-#2]**

90% of the time, the use of the form would be mailed to officials we inmates don't have physical access to. There isn't much need to use it with officials we are able to see face-to-face. It is to those officials that in the past GA-22 and Informal appeals were not answered or to ignored and vanish (and there's nothing an inmate can do about it). Since there is no receipt given in the instances that the new 22 form most commonly used, the receipt requirement becomes useless and the problems will continue. The only real change is that staff will now be discarding a more expensive form instead of a single half page sheet. It will only cost more while inmates continue to try while an unresponsive and unaccountable process remains. I suggest: Officers picking up mail sign the Form 22 and provide the receipt as the form is placed into the mail bag to be processed. Such handling would be consistent with processing outgoing legal mail and at least prove that the form submission was attempted. **[JDR-#7]**

Adding a definition of "busy" to Section 3000 might be helpful in this matter. **[SA-#3]**

This new form has already created a substantial burden of paperwork for me as a chaplain. Inmates often write to chaplains through institutional mail with their requests, usually simple in nature. I receive anywhere from 50-75 of these requests each week. In the two weeks we have been using the Form 22, it has already overwhelmed me with extra work. Please consider limited the use of the Form 22 to issues that require a written response or explanation from staff. Simple requests for "things" (such as a Bible, Sympathy card, a prayer) should be made without requiring the 10 minutes it has been taking me to deal with each form. **[MCN-#1]**

Do not abandon the old GA 22 because it serves an important purpose in the daily lives of inmates whether they are requesting a visit with a nurse or counselor, or library access. Library access does not require the use of the CDCR-22, as we have our own system for documentation. Because the new regulations state that the new CDCR 22 can be used for "requests" and take the place of the GA-22 were are now receiving NCR forms for simple requests for law library access. It will be a significant waste of the State's money to completely do away with this valuable form where there are no concerns to address. **[MH-L]**

The "new" appeals forms will be an additional cost to the taxpayer. It is not cost efficient to address the daily 602 **[COMMENTER ERROR—form reference should be CDCR Form 22]** issues submitted such as cold food, missing cookies, ripped socks, etc. The form is a multi-level carbon, which must be signed by staff for receipt and proof of service. This means the forms are more expensive than the existing single piece of green paper used. **[CCSO-#2]**

Most staff, if they're not involved in the 602 **[COMMENTER ERROR—form reference should be CDCR Form 22]** do not want to sign for routing because they think that they're going to be held responsible if somehow the [request] doesn't get answered at wherever it was sent. So inmates are having a hard time getting people to sign to route it...this is not a good thing. The old system was better. In fact staff wish they had a grievance process as good as the inmates' old 602 system. It'll probably end up working except for the fact that it's going to cost the taxpayers a lot more money; and I thought the Department was supposed to be trying to trim back and make things more streamlined and smooth. This is not going to do that. **[CCSO-#7]**

SUMMARIES AND RESPONSES TO ORAL AND WRITTEN COMMENTS

When the new form converts to a formal appeal, it gets attached to a two page (front and back of both) form. Whereas, the old 602-inmate appeal form is a an informal form at the lower levels, this new form is a legal format at the first level. This will cause major backup because normally staff are reluctant to sign for a document that is not intended for them and therefore making them somehow legally liable for the issuance and return. **[CCSO-#3]**

Staff, when not busy, are supposed to sign the Form 22. Someone high up needs to direct the CCPOA union on this because what information I've gleaned is that union reps are directly corrections staff to not sign the forms. **[PC-#2, PC-#3]**

The associated cost of this process is an increase compared to the way it has been done. In summary, the cost of the form itself will triple the cost of the form currently used. The workload on staff will more than double and the total cost, from beginning to end when handling an inmate appeal, will increase dramatically. **[CCSO-#4]**

An additional problem is that the coordinators are using (and calling) the new Form 22 as the new informal level and refusing to process the appeal even when fully explaining in the appeal and by letter that informal resolution has been tried to no effect. **[JDR-#8]**

A lot of [appeal] rejections are because staff, also uninstructed to the use of the new appeal system, have been keeping the wrong parts of the Form 22, therefore making getting to the supervisor's response part of the process impossible. **[Hou-#3, Hou-#4]**

Did information given to the staff on this policy differ from the text provided inmates? **[GEF-#3]**

Staff don't want to sign these forms or forward them. Additionally, what happens if staff don't comply with the 3 and 7 response timeframes? Nothing! There are no punitive ramifications. **[TEF-#3]**

Was the creation of a double informal process intentional? **[Hou-#6]**

Instructions posted on our bulletin board directly contradict those set forth in the closed-loop video or the informational brochure with respect to form usage. **[TEF-#4]**

The new form was introduced without adequate instructions to the inmates on how they are to be used. **[MH2-#9]**

On the Form 22, are they supposed to use it for every request now (i.e., sick call, request to see a counselor, etc.)? Has the CDCR 22 replaced the GA 22? **[MH-#3, GEF-#1]**

Where 3086(a) refers to the Form 22 procedure as a "non-conflictive communication process," such language is not clearly understood to mean whether the Form 22 procedure does not conflict with the Form 602 grievance procedure or is simply a neutral/non-adversarial process in and of itself. **[ECRK-#63]**

3086(d)(2) seems inaccurate insofar as inmates and parolees are required to relinquish their possession of the goldenrod copy of the form, and thus the only record they have of its language and submission date(s), when mailing per 3086(e). **[ECRK-#64]**

Obviously, even if inmates submit the Form 22 without staff signing them, nothing says that the staff to form is sent to must answer the inmate request. **[PC-#4]**

When I as a inmate want to get a signature, can any staff sign, even when it does not involve that staff member? **[GEF-#2]**

Where 3086(e)(1) states that mailed receipted copies may be returned by staff by the mail, such language is belied by the Form 22 itself, which states no receipt will be provided if mailed. **[ECRK-#65]**

(e)(1) gives staff who receive requests via mail the option of returning the receipt by mail. This should be mandatory. Staff at this institution have already stated in memo that sending requests by mail will not be receipted. Since most requests will be sent through mail, this negates the receipt system. The language as posed is open to interpretation. The optional return of the receipt could be a choice between returning through the mail or in person. Institutionally, the provision interpretation is an optional choice between returning the receipt through the mail and not returning it at all. This places us back in the contentious position of staff and inmates accusing each other of not sending, or not responding; essentially the same problem at the informal level of appeals. If the Department agrees with the assertion that no receipt need be sent, then we object to the entire establishment of 3086. This interpretation would render the receipt system into a "paper provision" which will serve only to exacerbate the discord between staff and inmates. **[SD & KB-#14]**

SUMMARIES AND RESPONSES TO ORAL AND WRITTEN COMMENTS

If a form is mailed and no receipt will be provided (as illuminated on the form itself) how does this ensure that the respondent received it? [SA-#4]

(e)(2), permitting rejection of an appeal if the inmate has not completed the Written Request process, must be deleted. This rule in fact creates a requirement that the request process, which lacks any centralized tracking or accountability, is to be used before an administrative appeal is filed. Tellingly, the ISOR is silent regarding the necessity of this particular language. Also, significantly, the rules do not clearly state the basis upon which an appeals coordinator can require a prisoner to use the written request process and no such basis is clearly set forth in any regulation. [SF-#8]

(f) (3) should be amended to require at least some staff to accept form 22's for forwarding. Current wording allows all staff to decline acceptance of forms they can not personally address and most do so. As a result, inmates are generally unable to get a signed and dated receipt for issues addressed to any office or setting they do not have physical access to (i.e., mail room, R&R, Litigation Coordinator, Law Library during lockdowns, etc.). Forms submitted through the mail are often "lost" or egregiously post-dated. While it may not be practical to require all staff to forward these forms, it could be done simultaneously with confidential mail pickup, for example.

[SH-#8]

RESPONSE: The vast majority of comments received regarding the CDCR Form 22 reflect the fact that at the time those comments were written the form was brand new and not all staff or potential users knew what to do with it, regardless of Departmental efforts otherwise (see page 15). As has been stressed elsewhere in this document (see pages 6-7) considerably more information has been provided, and much of the associated uncertainty dissipated. The question of added cost has been addressed elsewhere (see pages 16-17).

- For those writing to request that the form not replace the previous GA 22, it has not. Offender are free to use either form as appropriate. In addition, operation guidance has been provided which helps mitigate instances of Form 22 misuse where the GA 22 would suffice.
- The reason that there is no receipt when the form is mailed is that a receipt serves no purpose. The form itself is to be returned within three days. If an offender wishes a receipt they can give it to a nearby staff member who will give them the receipt before forwarding it to the intended recipient.
- The form was never intended to be a replacement for the old informal level of review. That step has been effectively abolished. The reason for the form is to ensure that actions or decision that are to be appealed, are documented in writing and subject to supervisors review before being considered final. This is consistent with all other classification and disciplinary processes. As staff become more familiar with the practices in question, backlogs and staff disinclination to participate will be increasingly easy to overcome.
- Information coming from the institutions indicates that after a few weeks use of the form increased and many issues were being resolved between staff and inmates without the inmate having to resort to the use of an appeal. This was the intended outcome.
- Supposed flaws in the (d) and (e) subsections of this rule do not exist in the manner presented by commenters. While the form itself is relinquished at various points of the back and forth between requester and responder, the final form is returned and this does constitute a formal record of the exchange. Any failure by staff to respond can be addressed in another request and ultimately the reason will be ascertained and corrected. The notion that staff need to be directed to respond is redundant to the requirements of subsection (f). The language of the form itself is consistent with (e)(1) because the rule specifies that the receipt "may" be returned by mail. Requesters are not guaranteed a receipt, if mailed.
- While there are comments stating that the CDCR Form 22 should not be a prerequisite to filing an appeal, it is not. However, when someone wishes to appeal something, they must provide some sort of documentation that what is being appealed actually happened. The CDCR Form 22 serves this purpose in the absence of some other form previously designated for that particular issue. The basis for requiring a completed Form 22 as documentation is the same as for any other supporting document, as previously required under subsections 3084.2(a)(2) and 3084.3(c)(5) (now superseded).

SUMMARIES AND RESPONSES TO ORAL AND WRITTEN COMMENTS

GENERAL MISCELLANEOUS COMMENTS

The following miscellaneous general comments are not accommodated for the reasons provided:

CDCR is more concerned with eliminating “the constant backlog of appeals at all levels” than it is with addressing and resolving credible issues that the appeal process would bring to light. One would think that CDCR would be more concerned with correcting violations of the Constitution and Title 15, than with implementing regulations that inhibit the inmate population’s ability to submit legitimate appeals that give voice and bring attention to credible issues that need to be addressed and resolved with the time constraints of the appeal process. **[Mic-#3]**

The ISOR contains much verbiage claiming the regulatory changes are necessary for different purposes. From my experience, the real purpose is to defeat or discourage prisoners to submit appeals because they many times highlight and emphasize employee misconduct, abuse or ineffectiveness. Additionally, the ISOR mentions that there are loopholes in the current regulations. The use of the term is inappropriate. A “loophole” is simply the absence of a regulation, such absence is by design. **[DF-#8]**

Rather than setting up additional obstacles to the filing of appeals, it would make more sense to analyze the appeals being submitted, so that the problems most frequently the subject of appeals could be corrected. In any case problems could be corrected in less time than would be needed to respond to the flood of 602s. **[JLT-#5]**

The number of 602s is a symptom, not the problem. So setting up obstacles, limits and punishments for filing them does not solve the underlying problems and inevitable will lead to more problems and eventually unconstitutional conditions of confinement. **[JLT-#8]**

An[y] observed decline in appeals reaching 3rd level will give the wrong impression that these changes are working. If decreasing numbers is all you want, you’ll have it, but at the cost of very few grievances being resolved [and] resulting in a marked increase in dissidence leading to acting out (those numbers will not be linked to the real problem, but will certainly be added to pleas for more funding). Times are returning to when there was no appeal system in place because [with] all of the [added] obstacles, it has been rendered stultified. **[JDR-#12]**

I expect this written comment will do little to change the poor conduct of prison officials. **[DF-#10]**

There would be a much higher reduction in the number of grievances that could be achieved by the adoption of new, more restrictive regulations if prison supervisory staff enforced regulations stipulating that (a) offenders have the right to be treated respectfully, impartially and fairly; and (b) employees shall be professional in their dealings with inmates (Sections 3004(a) & 3391(a)) **[JLM-#1]** Moreover, since there’s a direct correlation between un professionalism and low personal character, an added benefit of prison staff being required to be professional would be their gaining self-respect and thus positive self-esteem. **[JLM-#2]** By continuing to let prison employees treat inmates unfairly and unprofessionally while also cracking down on the ability of inmates to file grievance appeals, the administrators behind the new, draconian appeal regulations are having their cake and eating it, too. **[JLM-#3]**

As opposed to the appeal restrictions respecting less form space and longer waits to file non-emergency appeals, if staff has a complaint against an inmate, they are able to write up the same inmate ten times in a single day, in addition to placing the inmate in Ag Seg for program failure.

[Hou-#5]

I hope that comments are seriously considered and this policy is changed to reflect the concerns of all citizens, incarcerated or not. **[C3-#2]**

In summary, there is less space to write and more to have to write about. [Therefore] I request this does not go into effect. **[DAP-#4]**

The appeal process as it now stands is a useless tool in most cases and this proposed change does nothing but make it more difficult for the inmate population to file appeals on issues. **[MH2-#3]**

The overhaul of the appeal system is disingenuous and misleading to the public and the prison population; it seemingly serves no real purpose other than to further strip prisoners of their ability to file legitimate grievances; and the [offered] justifications...are nothing more than a canard, to put it kindly. **[KDS-#11]**

SUMMARIES AND RESPONSES TO ORAL AND WRITTEN COMMENTS

My intent is to demonstrate how the proposed revisions are a blatant, overt attempt by the Department to deprive inmates and parolees of their constitutionally guaranteed right to seek grievance redress. **[WR-#1]**

Without addressing the issue of creating an incentive for staff to adhere to the regulations or comply with the appeal time-limits or have some sort of punitive action for not complying, appeals and the appeal process will still suffer and the process will not be fair and effective. **[TEF-#2]**

Until such time that the Department can prove it can fairly analyze and handle inmate appeals, I respectfully ask that these proposed changes NOT be allowed. **[MH2-#10]** Taking into consideration the sixty-five objections, errors and accommodation requests voiced, the Department should not adopt the text in its present form, but rather should revise accordingly and thereupon invite further public comment of the revisions made thereto. For the reasons provided, please do not allow the above-referenced regulations as they are currently being proposed to be adopted. **[ECRK-#1, ECRK-#66]**

Your failure to fix these [cited] problems over seven years of 602's shows corruption and criminal activity. Prove to me you actually care. I have many more substantial issues I could share with you. Your lack of comprehensive response will be all the proof I need of corruption. **[JPF-#4]**

The old system was bad enough, but the new system is terrible and should be re-revised to be fair and protect the prisoner's right to redress the CDCR and the courts. **[EDC-#7]**

Go back to the old appeal process, it would save money. I barely understood some of that, and to and this new policy does affect me a lot and makes it more difficult for me to challenge loss of my rights when they are violated continuously here in the SHU. **[SM-#2, SM-#3]**

What kind of appeal system is that that punishes inmates for filing 602s that might not meet new and confusing standards? **[JLT-#16]**

To severely curtail the ability of prisoners to file grievances would be counter productive to prison security. Indeed, no penologist (other than a sellout company man) would endorse that curtailment. **[JLM-#4]** When intelligent people who should know better methodically do something idiotic like this, one has to ask, "What's really going on?" **[JLM-#5]** Any respected penologist, after examining the newly revised appeal regulations and my comments in opposition would unquestionably recommend against approval of the changes. **[JLM-#14]**

There are many aspects that impede, complicate and basically make it impossible for California prisoners to file and pursue an appeal. All this seems geared toward to taking full advantage of the US Supreme Court's holding in the cited case which requires prisoners to not just simply exhaust administrative remedies but to "properly exhaust" them. The court held "proper exhaustion" means complying with the regulations that govern the particular prison system's appeal process. Consequently, if these regulations are too complex and exacting to the point where prisoners cannot realistically fully comply, the lawsuits that the Department will have to defend against will sharply decrease. In the end, this appears to be the point. **[SM-#5, JP-#5, MB-#5]**

The problems that have arisen as a result of the new amendments must be immediately resolved because, if not, they will inevitable lead to more complications and potential challenges through civil litigation. Until then, the old complications, inefficiencies and inconsistencies are simply being replaced with new ones. **[JA-#4, MAW-#4]**

What else can CDCR take away from our loved ones? 602's are their only defense against the inhumane conditions in prison. **[Anonymous Text Message]**

Several provisions of the changes are at best a solution in search of a problem and at worst an unnecessary and cynical attempt to impose complex pleading requirements on an uneducated inmate population in order to gain an advantage in subsequent litigation. **[CCW-#1]**

I have reviewed the web site with the changes. It appears you have total idiots working to add to the already punitive stance of the state with respect to inmates. As a registered voter and taxpayer, I insist you change these changes...inappropriately [imposed] upon inmates. Attempt some sane thinking and add to that, some positive gains [in the] changes you make. Punitive is not appropriate, and this sure has the appearance of added punishment to inmates. **[RR-#2]**

RESPONSE: None of the foregoing comments constitute **reasonable** suggestions or recommendations for alternatives more effective or as effective and less burdensome in carrying the purpose of the changes in question. In fact the comments and objections are almost all (as

SUMMARIES AND RESPONSES TO ORAL AND WRITTEN COMMENTS

often as not) threats or demands (if not openly voiced, then thinly veiled), mirroring the overall theme of exaggerated alarm and the most dire of expectations predominating nearly all of the comments received.

- Cynical, disingenuous or corrupt motives, as well as lying and idiocy on the part of the Department and its personnel are “proven” by the contents of the NCR, ISOR and text—at least according to certain commenters in particular. The real purpose, in their minds, is to defeat or discourage appeals by setting up additional obstacles, limits and punishments for filing. Another often expressed attribute is the assertion that the existing appeal process is already useless enough, prison conditions inhumane and the changes make matters only worse.
- Likewise, appeal backlogs, processing difficulties and similar problems are entirely the fault of the Department, an absence of staff professionalism or some other reason intended to deliberately disadvantage the appellant, especially with respect to thwarting satisfactory administrative remedies or proper exhaustion of grievance options.
- Frequently the commenter and prospective appellant appear focused on—and frustrated by—what they perceive to be needless obstacles, entirely oblivious to the fact that Department personnel in general and appeals staff in particular operate in the context of broader constraints, not the least of which is the need to ensure the safety of themselves, the inmate and the facility as a whole. That this seems to come with the territory and often has quite peculiar consequences in the context of input about prison rules during the APA public comment phase has been frequently observed in conjunction with numerous responses provided above.

Unquestionably, appeals often do contain allegations of staff misbehavior and suggest conduct, if true, of a suspect nature. It is for this reason that the staff complaint process has been included in the NCR #11-02 package.

- Evaluation of such claims by the hiring authority is guaranteed, and will not be thwarted by appeal withdrawal, mistaken use of forms or other means (such as inclusion of more than one appeal issue warranting appeal rejection) that might otherwise sidetrack review of such matters.
- Even in the event an internal affairs investigation is unwarranted, a confidential inquiry shall be initiated.

That said, apparently for many commenters neither these safeguards nor any other amount of reworking or revision would be satisfactory for them.

- Appellant “suffering” will continue from the inhumane conditions, the appeals process will be unfair and ineffective, staff will continue to be sellouts devoted the disrespectful and unjust treatment of offenders.
- However psychologically necessary it may be for the convicted and their supporters to inflict such negation upon others, doing so in this context is pointless and far beyond any responsiveness expectation of the Administrative Procedure Act. Naturally enough, at least one commenter, as the final last word, asserts exactly the opposite—failure to comprehensively respond in the manner he demands is “proof” of Departmental corruption.

As previously noted (page 36), while playing no role in determining the fact of incarceration, the Department looms unnaturally large in the minds of those delivered into its custody.

- It would be unrealistic, therefore, not to assume that at least some incarcerated individuals are vulnerable psychologically to the impulse to think first of retribution for “unjust” treatment, the frustrations of incarceration being the most fundamental “wrong” personally encountered.
- Consequently, as a target, the Department and staff can’t be missed and any grievance system available and/or opportunity to comment about same will become the means of delivering blows, great, puny or even nonsensical.

Nevertheless, comments alleging staff insensitivity, disconformities in policy and or practices and similar such claims and allegations generally have been answered thoroughly in conjunction with the responses found on pages 7 - 65 above. These responses demonstrate (if not prove irrefutably) that the Department never had as it’s intention, with the adoption of these rules, the deliberate silencing of inmates or the curtailment of existing rights afforded offenders and that assertions to the contrary are wholly unfounded (and often overly dramatized).

SUMMARIES AND RESPONSES TO ORAL AND WRITTEN COMMENTS

- While perception of the intent of some of changes as penned by commenters has been somewhat surprising both in content and intensity, any unintentional creation of “problems” has been addressed with satisfactory explanations as appropriate in a manner consistent with the expectations and requirements of the APA.
- Beyond that, there has been no attempt to address, reply, correct or challenge misrepresentations, exaggerations and demands beyond the most prominent of such posed. Trying to seriously respond to each and every comment (many of which are repetitive, of questionable intent and/or wildly suppositional) would make for an unwieldy document (as well as exceed the APA required degree of responsiveness, as already noted).

Therefore, other than the non-substantive changes presented on page 1 above, no further accommodation will be made, for the expressly stated reasons. As there is no necessity for further public input the changes accordingly will remain substantially as originally promulgated on January 28, 2011.